80-936

No.

Supreme Court, U.S.
FILED
DEC 5 1980
MICHAEL RODAK, JR.,

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO,

Respondents.

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

v.

NATIONAL SUPER SPUDS, INC., *et al.*,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did Congress create an implied cause of action for damages against commodity brokers under the following provisions of the Commodity Exchange Act:

> (i) section 4a which authorizes the Commodity Futures Trading Commission, formerly the Commodity Exchange Commission, to set speculative trading and position limits for specific commodity futures contracts and which makes it unlawful to exceed those limits;
>
> (ii) section 4b which makes it unlawful for a member of a commodity exchange "to cheat or defraud" his customers; and
>
> (iii) section 9(b) which makes it a felony for any person "to manipulate . . . the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner . . . any such commodity. . ."

despite expressly providing many judicial and administrative means of enforcing these provisions including criminal penalties, civil fines and an administrative remedy for plaintiffs' claims.

* * *

Similar issues are the subject of the pending petition in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, (U.S. Aug. 9, 1980) (No. 80-203). In addition, the question whether Section 5(d), 5a(8) or 9(b) of the CEA provides an implied cause of action for damages against a commodity exchange and its officials is the subject of the pending petition of the New York Mercantile Exchange ("Exchange") in one of these cases.

The present cases and the *Curran* case together provide the op-

portunity for review of the implied cause of action most of the key provisions of the CEA. See Brief *An* with Respect to Petition for a Writ of *Certiorari* file change in *Curran.**

PARTIES BELOW

The parties to the three consolidated appeals belo

No. 79-7402

Appellants: Neil Leist, Philip Smith and Incon

Appellees: Heinold Commodities, Inc. ("Heino son & McKinnon Auchincloss Kohlmeyer Ir son"), Clayton Brokerage Co. of St. Louis, Excl ard B. Levine, Howard Gabler, and Alfred Pen

No. 79-7464

Appellant: Incomco,

Appellee: Exchange.

No. 79-7482

Appellants: National Super Spuds, Inc., Williar Jr., Willard C. Shiner, Eugene P. Weisman, Ri Raymond Rothberg, Arthur S. Armstrong, Tl nek, Capgain Holdings, Inc., and Heiz Rommi

Appellees: Heinold and Thomson.

Heinold and Thomson seek review of the judg 79-7402 and No. 79-7482. Heinold and Thom parties to the appeal in No. 79-7464.

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*The following abbreviations are sometimes used in "CEA" for the Commodity Exchange Act, as amended (*seq.*); "CFTC" for Commodity Futures Trading Commis for futures commission merchant. In addition, the page n majority and dissenting opinions which are cited in this P page numbers appearing in the opinions as issued by Appeals. These opinions are contained in the Appendix (

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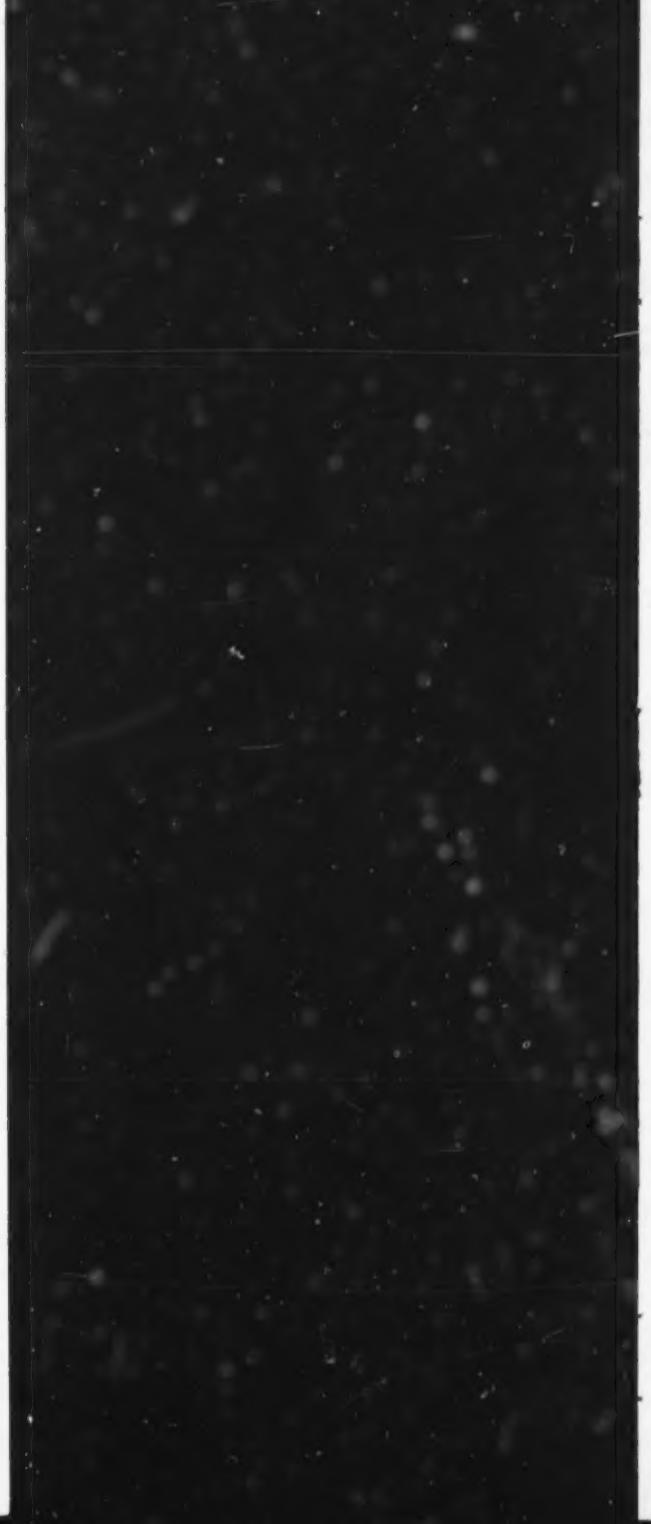

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 4a, 4b and 9(b) of the Commodity Exchange Act, as amended (7 U.S.C. §§6a, 6b and 13(b)), and Article I, Section 1 of the United States Constitution are set forth in the Appendix hereto (192a-213a).

STATEMENT OF THE CASE

Petitioners are commodity brokers which are registered as "futures commission merchants" with the CFTC. The two cases in which these petitioners are defendants charge petitioners with violations of Sections 4a, 4b and 9(b) of the CEA. Section 4a, which was enacted in 1936, authorizes the CFTC to set speculative trading and position limits for commodity futures contracts and makes it unlawful to exceed those limits. Section 4b, which also was enacted in 1936, makes it "unlawful to cheat or defraud" a customer in connection with the making of futures contracts.[1] Section 9(b) prohibits any person from manipulating the price of or cornering any commodity in interstate commerce or for future delivery on or subject to the rules of any commodity exchange. This language was added in 1936 to Section 9 of the Grain Futures Act of 1922. All three sections are criminal provisions.

None of these sections, nor any other provision of the Act, expressly authorizes the institution of actions by traders in the federal courts; nor does the CEA provide a general grant of jurisdiction to the federal courts to hear such actions as was provided in the 1933 and 1934 Securities Acts.

The CEA does, however, expressly provide for fines and imprisonment in criminal prosecutions, and for numerous other judicial and administrative means for enforcing these provisions. Among

[1]The language of Section 4b is strikingly similar to the language of Section 206 of the Investment Advisers Act of 1940 (15 U.S.C. §80b-1 *et seq.*) which this Court held in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) did not provide a private cause of action for damages.

those means, enacted in 1974, is an administrative proceeding before the CFTC for the redress of any person's claims or grievances against FCMs such as petitioners. Plaintiffs' claims against the petitioners could have been presented and adjudicated in such an administrative proceeding.

Plaintiffs in these actions are traders who held long positions in May 1976 Maine potato futures contracts which were liquidated prior to the close of trading on May 7, 1976. All of these plaintiffs are admittedly "speculators" as distinct from "hedgers," the latter being persons who produce, use, handle, or merchandise a particular commodity. None of the plaintiffs was a customer of these petitioners with respect to the purchase of their "long" contracts. Indeed, petitioners acted as brokers for persons on the opposite side of the market from plaintiffs.

The District Court granted these petitioners' motions for summary judgment on the counts in the complaints which charge violations of Sections 4a, 4b and 9(b) of the CEA.[2] The plaintiffs appe ed and over the vigorous and well-reasoned dissent of Judg Mansfield, the Court of Appeals reversed.[3]

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[2]The jurisdiction of the District Court in No. 79-7402 with respect to the claims asserted under the CEA was allegedly based on 28 U.S.C. §§ 1331 and 1337 and in No. 79-7482 jurisdiction was allegedly based on 28 U.S.C. §1337.

[3]In reaching its decision, the District Court applied the test enunciated in *Cort* v. *Ash*, 422 U.S. 66 (1975) and applied in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). The District Court did not have the benefit of this Court's decisions in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). After examining the provisions of the CEA which provide the CFTC with an array of enforcement powers and these plaintiffs with an administrative remedy to recover damages arising from violations of the Act, the District Court held that no private right of action against futures commission merchants existed under that Act because "two critical elements of the [*Cort* v. *Ash*] test, congressional intent and consistency with the statutory scheme, weigh strongly against the implication of such a right." (470 F.Supp. at 1261)

REASONS WHY THE WRIT SHOULD BE ALLOWE

Since the enactment of the 1974 amendments to the CEA, question of the existence of implied private rights of action un the CEA has frequently been presented to the courts. The maj ty opinion lists at least nineteen decisions upholding such rig and eight decisions in addition to that of the district court in th cases denying such rights.[4] The split of decisions requires a fi and definitive answer by this Court.

The questions before the Court are of extraordinary pract importance to the commodity futures industry. The decisior the Court of Appeals, if permitted to stand, will expose comm ty brokers to enormous liability, never intended by Congress, will vitiate Congressionally-mandated procedures governing olution of disputes between commodity brokers and their c tomers. The reparations procedure provided by the 1974 ame ments to the CEA and other non-judicial means for resolv complaints such as arbitration will be undermined and the cos resolving customer grievances is likely to increase.[5]

[4]Other decisions which are not cited in the opinions below but wh have passed on implied causes of action under certain provisions of CEA include *Gonzalez* v. *Paine, Webber, Jackson & Curtis, Inc.*, F.Supp. 499 (S.D.N.Y. 1980); *Mullis* v. *Merrill Lynch, Pierce, Fe & Smith, Inc.*, 492 F.Supp. 1345 (D.Nev. 1980); *Hensley* v. *Madu Sons, Inc.*, 2 Comm. Fut. L. Rep. (CCH) ¶21,017 (C.D.Cal. Ap 1980); and *Comstock Investors, Inc.* v. *Rosenthal & Co.*, [1977-1 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,934 (C.D. December 7, 1979). The courts in each of these cases denied the tence of implied causes of action under the CEA. Since the deci sought to be reviewed, other lower courts have faced the issue and sharp division of judicial opinion continues. See *Gray* v. *Thon McKinnon Securities, Inc.*, No. C-79-3325 SAW (N.D. Cal. Septen 29, 1980) (denying an implied cause of action).

[5]In 1974, Congress required contract markets to establish proced for private arbitration of customers' claims and grievances against exchange member (7 U.S.C. §7a(11)). In addition, a registered fut association must provide procedures for the resolution of custon claims and grievances against any member of the association (7 U. §21(b)(10)).

In addition, the decision of the Court of Appeals will ope doors of the district courts to a large body of additional new l tion which Congress has never expressly authorized. This is l tion of a type which this Court has held "presents a danger o atiousness different in degree and in kind from that which ac panies litigation in general." *Blue Chip Stamps* v. *Manor Stores*, 421 U.S. 723, 739 (1975). The present cases well trate this point. Petitioners are charged with cheating an frauding persons with whom they have had no relationship. I dition, in these cases the longs are claiming manipulation b shorts and the shorts are asserting manipulation by the longs the interacting net effect of these alleged manipulations on ket prices at any specific time is impossible of even rough mea ment.

The holding of the Court of Appeals majority that Sectio 4b and 9(b) of the CEA provide implied causes of actio damages in favor of these plaintiffs is erroneous and confli principle with the decisions of this Court setting forth the dards for the implication of private causes of action.[6] The ho —which, as pointed out in Judge Mansfield's dissent, goes beyond statutory construction and amounts instead to "ju legislation"— (i) raises important questions of constitution in light of the vesting of legislative powers exclusive Congress; (ii) erroneously assumes that the issue is wheth private cause of action" exists under the CEA generally, r

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[6] *Transamerica*, *supra*; *Redington*, *supra*; *Kissinger* v. *Reporters mittee for Freedom of the Press*, 445 U.S. 136 (1980); *Cannon*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979); *Blue Chip Stamps*, *Cort*, *supra*; *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (*Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977); *Securit vestor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975); *Nationa road Passenger Corp.* v. *National Association of Railroad Passe* 414 U.S. 453 (1974) ("*Amtrak*"); *Wheeldin* v. *Wheeler*, 373 U. (1963); *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959); *S men's Union* v. *National Mediation Board*, 320 U.S. 297 (194 Judge Mansfield's dissent at pp. 4107-11.

than whether these plaintiffs can base an implied ca
for damages on either Section 4a, 4b or 9(b); (iii)
the principles established in this Court's decisions
statute expressly provides many judicial and a
means of enforcement, including criminal penalti
and an express administrative remedy, an addit
remedy will rarely be implied; (iv) is based on t
assertion that Congress, by amending various pro
CEA in 1974, "re-enacted" Sections 4a, 4b and 9
the judicial interpretations given to the Act by a fe
decisions based on clearly erroneous grounds; (v) er
sumes that pre-1974 decisions had unanimously and
interpreted the CEA as providing the causes of act
plaintiffs' claims are based despite the fact that *no p*
sion had held that members of a class to which pla
had a cause of action for damages under either Sec
9(b); (vi) erroneously avoids analysis of the legislat
these sections at the time of their enactment; and (vi
clusions as to the intent of the 1974 Congress which
to the legislative history.

If *certiorari* is granted, this *will be the first time t*
raised by the petitioners will have been placed before

**A. Since Congress Did Not Provide Any Private Ri
Under Any Of The Provisions Of The CEA,
That Such Rights Can Be Implied Under Sectio
9(b) Of That Act Raises Important Questions
tional Law In Light Of The Vesting Of Legisl
Exclusively In The Congress.**

Article I of the Constitution vests "all legislative p
Congress. Under Article III, Congress also has
sponsibility for determining the jurisdiction of the
courts. Congress alone can create rights of action a
diction over them in the courts. Article III also make

the legislative power can only be exercised through
both Houses of "bills" which after approval by
become "laws." While courts can construe such law
what Congress did in fact enact, the courts have no
what they may feel Congress omitted, even inadv
ever desirable the courts may feel such additions w
cannot rewrite or correct the laws they are called
strue.

Thus, under our Constitution, a right of action u
"law" cannot exist unless Congress intended to cre
law was passed, and has somehow made its intenti
creation must be unmistakably the "act" of Cong
Mansfield said in his dissent (p. 4111): "Absent ev
intent, judicial creation of a private remedy amo
sumption or usurpation of the legislative function
the separation of powers doctrine." Even if these
tional principles have been occasionally overlook
such oversights cannot operate to amend the Const
made clear in *Erie Railroad Co.* v. *Tompkins*, 304
(1938).[7]

In the days before *Erie* when the federal court
existence of a federal common law, the courts utili
law theory to justify actions for damages for brea
statute, treating such breach as a "tort." Thus this
& Pacific R. Co. v. *Rigsby*, 241 U.S. 33 (1916), he
ployee could bring an action based on an injury du
of the federal Safety Applicance Act. The Court

> "A disregard of the command of the statute
> act, and where it results in damage to one c

[7] *See TVA* v. *Hill*, 437 U.S. 153, 194-95 (1978); *Sink*
99 U.S. 700, 718 (1878); *Cannon*, 441 U.S. 677, 730-49
senting); *See also Wilson* v. *First Houston Investment*
1235, 1244-45 (5th Cir. 1978) (Hill, J., dissenting), *va*
on Transamerica, 444 U.S. 959 (1979).

> whose especial benefit the statute was
> recover the damages from the party in
> cording to a doctrine of the common l
> 39)

No effort was made to ascertain whether
create a cause of action; on common law pri
. . . be deemed to create a liability in [plainti
in the form of an actionable tort.

The concept of a violation of a statute c
able tort is embodied in the *Restatement*
(1963). Logically, its validity with respect t
ended with *Erie Railroad*, which made it
federal common law, and hence no feder
However, the outdated tort rationale was th
lower court decisions upholding implied ri
the majority opinion.

Under the "tort theory," an action co
brought without any evidence of Congressi
the statute prohibited certain conduct and
was an obvious beneficiary of the prohibitio
nition that under the Constitution an implie
be just as much the intentional creation of
plicit one has forced the rejection of argume
theory." Express rejection occurred as earl
v. *Wheeler*, 373 U.S. 647 (1963), where an
tionable tort in a violation of the statute gov
subpoenas was rejected. Justice Douglas p

> "As respects the creation by the feder
> law rights, it is perhaps needless to st
> the free-wheeling days antedating *Erie*
> (373 U.S. at 651)[8]

[8]Mr. Justice Brennan dissented because he
existence of federal common law torts based on v
ute.

Common law tort theory cannot take
evidence of Congressional intent necessar
private right of action not expressly pro
language. This Court has repeatedly he
private cause of action not expressly pro
less be held to have been created is by fi
Congressional intent to provide one. *Tra*
20; *Amtrak*, 414 U.S. at 457-58; *SIPC*
Cannon, 441 U.S. at 731. The necessity fo
tent" was made plain in *Amtrak*, 414 U.S.
and the "tort theory" was specifically repu
U.S. 560, 568 (1978). As *Cannon*, 441 U
". . . [T]he fact that a federal statute has
person harmed does not automatically giv
of action in favor of that person." Nev
Second Circuit cases cited and relied on
were expressly based on tort theory.[9] Th
where recognizes the demise of the tort t

B. The Majority Erred In Assuming Whether "A Private Cause Of Act CEA Generally, Rather Than Wheth Action For Damages Exists Under Each Separately Considered.

The first error of the majority opinion
any provision of the CEA implied a priv
"a private cause of action existed under
plicable to all violations of any of its prov

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[9] *E.g. Brown* v. *Bullock*, 194 F.Supp. 207, 2
F.2d 415 (2d Cir. 1961) (cited at p. 4049); *F*
World Airways, 229 F.2d 499, 501 (2d Cir.
Fischman v. *Raytheon Mfg. Co.*, 188 F.2d 7
(cited at p. 4047); *Reitmeister* v. *Reitmeister*
Cir. 1947) (cited at p. 4051); *Baird* v. *Frank*
1944) (cited at pp. 4047, 4050).

reasoning, the majority opinion f
1974 "unanimously upheld the im
action *under the CEA*" (p. 4053; e
reversed the District Court.

The fact that none of the pre-197
ity opinion had upheld a private
speculators and non-customers aga
tion 4a, 4b or 9(b) was ignored
majority assumed that if some plai
a violation of some provision of the
anybody else for violating any oth
strange fallacy, the majority opini
before it as whether "there is an im
CEA" (p. 4022 n.1).[10]

This notion is plainly bad law. T
even when an implied private reme
statutory provision, it is not necess
plaintiffs under the same provisio
the statute. *Redington*, *supra*; *Pipe*
Inc., *supra*; *Blue Chip Stamps*, *su*
causes of action may be implied u
customers against their brokers, t
who are not within this protected c
some courts have held that suits
changes under Section 5(a) does
brought by speculators against bro

As a result of this mistaken view
ion never faced up to the real issue

[10]The assumption that the issue was
right of action existed "under the
speaks at least eight times of "*an* im
4057, 4059 n.19, 4060 n.19, 4062, 407
times of "*a* private cause of action" (p
4063 n.21, 4077, 4078, 4080) and at le
of action" (pp. 4051 n.14, 4059, 4060 h

damages against brokers could
tomer speculators because of all
and 9(b).

**C. Because The Text and Legis
And 9(b) Provide No Evide
Create A Cause Of Action
These Provisions, The Maj
ciled With Recent Decision**

Section 4b makes it unlawful
with orders "for or on behalf of a
or defraud . . . such other person
other person any false report . .
other person." (7 U.S.C. §6b) T
the broker cheats or defrauds
section mention parties having n
face of this language, no possibl
tiffs, non-customers of these peti
especial benefit this provision v
field's dissent at 4126-47.

Section 9(b) makes it a felony
the price of any commodity in in
delivery on or subject to the rul
corner . . . any such commodity
Mansfield points out in his disse

> ". . . §9(b), like §4b, does n
> special class of which plain
> the light of the Act's overall
> enacted for the benefit of th

[11] *See Chipser* v. *Kohlmeyer & Co*
1979) ("Section 4b makes it unlawf
or defraud' a *customer* or willfully
or reports to a *customer* in connec
modities exchange.") (Emphasis ad

> consumers of comm
> tors. . . . [T]here is n
> or legislative history
> ed it to be enforced
> remedies provided b
> Act."

Similarly, Section 4a, wh
tion of the burden of
CFTC to set speculative
ty futures contracts and
was surely not intended
whose activities it was di
Fe Industries, Inc., 430
891, 893 (N.D. Ill. 197
mention of any remedy n
Judge Mansfield wrote i

> No court has ever
> under §4a. The secti
> excessive speculatio
> language of the sect
> for the protection of
> gestion that Congres
> action upon any pers
> claimed to be damag
> section. (pp. 4141-4

As with Sections 4b and 9
or alter any civil liabiliti

Because Sections 4a,
Congress' intent at that
mining whether a private
ed, not the intent of Co
575 n.16.[12] *And the 19*

[12]The principle that legis
Congress is well-settled. Se
GTE Sylvania, Inc., 100 S
(Footnot

evidence suggesting th
enforced through priv

Yet even if the legi
considered, it is clear
private cause of action
wrote in his dissent:

> "The legislative h
> runs into hundred
> and debates, fails
> right of action, de
> a Senator to the s

**D. The Majority Er
The Fact That Se
sions Which Are
ment And Other J**

**1. Because Sect
no private ca
when as here
tended to cre**

Sections 4a, 4b an
adopted were punisha
1958, this Court poin
Robinson-Patman Act

> "Section 3 contai
> provisions; in the
> sional intent to t
> familiar principle
> plemented by civi
> *Milk Co.* v. *Carn*

(Footnote continued fro
Community College v.
Mayer & Co. v. Evans, 4
hood of Teamsters v. *U*
SEC v. *Capital Gains*
(1963); *United States* v.

Nashville Milk c
Congress had "n
tion could not be

The principle
today. In *Chrysl*
Court said:

> "In *Cort* v. *
> has rarely i
> statute. . . .

**2. The pr
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The CEA pro
violation of Sec
13(c)), other juc
The CFTC is au
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U.S.C. §9), to su
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members (7 U.S
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Any person com
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§18). See, in addi

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may deem app
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said in *Transa*

> "Yet it is
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> mindedly
> *non* v. *U*
> dissenting

Where, as her
times (in 1968
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proaches certa

**3. The
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right**

Criminal sta
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specific class
them a particu
points out (44

sions relied on by the majority opinion (p. 4052) are either cases dealing with statutes creating express rights (*Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); and *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969)); or cases dealing with statutes creating a duty in favor of the public at large which imply a right of action only on behalf of the United States (*Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967); *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960)). The results in all these cases are thus irrelevant to the consideration of the present case, since neither Section 4a, 4b nor 9(b) creates any *civil* rights or duties.

Cannon went on to point out that "the Court has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large" (441 U.S. at 690 n.13). Criminal statutes making conduct unlawful are among those which simply create duties "for the benefit of the public at large." Here we have another reason why no private right of action should be implied from Sections 4a, 4b and 9(b). As *Cannon* states (441 U.S. at 690 n.13):

> "Not surprisingly, the right-or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action (citing cases)."

Neither Section 4a, 4b nor Section 9(b) contain any such "right-creating" language.

4. The multiple remedies for violations of Sections 4a, 4b and 9(b) make implication of a private cause of action for damages unnecessary to achieve Congress' purposes.

This Court has recently emphasized that an intent to create a private right of action can rarely be found to exist unless it is clear that such a right of action is necessary to "insure the fulfillment of Congress' purposes." *Piper*, 430 U.S. at 41. This Court has further said that "a private cause of action under the anti-fraud

provisions of the Securities Exchange Act should not be implied where it is unnecessary to ensure the fulfillment of Congress' purposes in adopting the Act." *Santa Fe Industries, Inc.*, 430 U.S. at 477. Hence, an important reason for refusing to imply a private cause of action in these cases is that "it is not necessary to make effective the Congressional purpose." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 316 (1979).

In view of the numerous other remedies for violations of Sections 4a, 4b and 9(b), no one could seriously contend that a private right of action was *necessary* to ensure the fulfillment of Congress' purposes in enacting those provisions.

E. The Majority Erred In Assuming, Contrary To Fact, That The 1974 Congress "Re-enacted" The Relevant Provisions Of The CEA, And By So Doing Incorporated A "Preceding Judicial Interpretation" Upholding Implied Causes Of Action.

The fundamental premise of the majority opinion was that the 1974 amendments to the CEA constituted a "re-enactment" of the provisions under which private causes of actions are claimed by these plaintiffs:

> "However, what we have developed up to this point is alone sufficient to invoke 'the well-recognized canon of construction that the reenactment of a statute incorporates preceding judicial interpretations.' " (p. 4078)

The majority opinion would apply the presumption arising from a "re-enacted" statute to the post-1974 CEA, and emphasizes its reliance on such "presumption" by asserting that it would require "an exceedingly strong showing of an intention to abolish the private cause of action" (p. 4080; see also p. 4082). Finally, the majority flatly asserts:

> "But the law before us was enacted on October 23, 1974 and 'the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was.' " (p. 4090)

But the "law before us," to the extent that it refers to Sectio 4a, 4b and 9(b), was enacted in 1936, not 1974. Public La 93-463, 88 Stat. 1389, enacted October 23, 1974, was nothi more than a series of *amendments* and *additions* to the CEA, a in no sense was a "re-enactment" of that Act. Most importantl it contained no "re-enactment" of the relevant language of Se tions 4a, 4b and 9(b). Such language is nowhere repeated in t 1974 legislation; nor was the wording on which plaintiffs ba their claims even amended at that time. As the author of t majority opinion admits, "the relevant substantive provisio were left unchanged" in 1974. Thus the "canon of constructio dealing with "re-enactments" has no relevance to these cases.

F. Even If The 1974 Amendments Constituted A "Re-enac ment" Of The Relevant Provisions Of The CEA, The Majo ty Erred In Holding That The Pre-1974 Lower Court De sions Amounted To A "Settled" Interpretation That Priva Causes Of Action For Damages Could Be Implied Under Se tions 4a, 4b And 9(b).

1. The basic premise of the majority's reasoning, th "every" decision prior to 1974 upheld private causes action under the CEA is not true.

The majority opinion asserts that private rights of action unc the CEA had been "universally recognized" (p. 4080) by "the u broken line of decisions upholding a private right of action unc pre-1974 law" (p. 4054). The majority lists eleven cases as cons tuting this "unbroken line" (pp. 4054-55).[13] However in asserti that "every" pre-1974 decision confronting the question h

[13]The extent of the majority's reliance on the supposed unanimity these pre-1974 decisions is emphasized by the fact that the unanimity claimed in at least eleven other places in the majority opinion (pp. 40 4059, 4061, 4072, 4079, 4080, 4094).

found an implied right of action (p. 4079 n.32), the majority c
ion overlooked at least two important decisions to the contra

1. *Rosee* v. *Chicago Board of Trade*, 311 F.2d 524
Cir. 1963).

A member of the Board of Trade brought suit because o
suspension from trading, but his suit was dismissed for "wa
jurisdiction under . . . the Commodity Exchange Act" (311
at 525). The Court of Appeals explained:

> "The Act proscribes certain practices by members of a b
> or contract market and provides the sanction of crim
> penalties. The statute does not expressly provide for
> enforcement of any correlative rights corresponding to
> statutory duties." (311 F.2d at 527)

The court concluded that "Appellant has failed to establish
. . . the Commodity Exchange Act provides a civil remedy
review of arbitration and disciplinary proceedings by the Boa
Trade" (311 F.2d at 528).

The Court specifically pointed out that the Board's "pros
tion of fraudulent contracts creates public rights, as is manife
by criminal sanctions," but that "in this respect" the CEA di
from the Railway Labor Act which created rights for the be
of specific parties (311 F.2d at 527-28). *Rosee* thus denied
the criminal provisions of the CEA could imply a private cau
action.

2. *Insdorf* v. *Chicago Mercantile Exchange*, No. 61 C
(N.D. Ill. Oct. 18, 1965), *aff'd without opinion*, (7th
Sept. 13, 1966).

Here a speculator alleged that the Exchange permitted va
onion traders to hold positions in excess of daily trading li
and also charged the Exchange with other failures to enforc
rules and to perform its duties under the CEA. The complain
serted claims under Section 4 of the Clayton Act, the CEA

the common law. A motion to dismiss relying, *inter ali*
ville Milk and *Rosee* was granted by the district
Seventh Circuit dismissed the appeal by order becaus
ment from which this appeal was taken is suppo
record."

* * *

The number of times suits based on asserted priva
actions under the CEA may have been denied by dis
without opinion cannot of course be ascertained from
To assert, as the majority opinion does, that "ever
case" (p. 4079 n.32) upheld a right of action is not on
in face of *Rosee* and *Insdorf*, but in any event "lac
empirical basis," to use Judge Friendly's phrase (p. 4

**2. The pre-1974 cases did not establish a "settl
interpretation that rights of action against I
be implied under either Section 4a, 4b or 9(b
non-customer speculators since not one of
held.**

Five of the eleven cases relied on by the majority
hold" a right of action under the CEA.[14] In *Gould* t
denying defendant's motion to dismiss for want of
did not decide whether a cause of action existed as the
not before it. *Hecht* involved a charge that a broker "
account in violation of Section 10(b) of the Securitie
Act. While the court remarked *obiter* that a cause of
the CEA might lie, since the account included comm

[14] *Gould* v. *Barnes Brokerage Co.*, 345 F.Supp. 294 (N.D
Hecht v. *Harris, Upham & Co.*, 283 F.Supp. 417 (N.D
modified, 430 F.2d 1202 (9th Cir. 1970); *Booth* v. *Peav*
modity Services, 430 F.2d 132 (8th Cir. 1970); *Johnson*
F.Supp. 764 (S.D.N.Y. 1972); *Seligson* v. *New York*
change, 378 F.Supp. 1076 (S.D.N.Y. 1974), *aff'd. sub n*
New York Produce Exchange, 550 F.2d 762 (2d Cir.), *cer*
U.S. 823 (1977).

actions, no such claim was considered and both the t
appellate court held that the "commodity losses
recoverable by plaintiff *as such*" (283 F.Supp. at 44
1212). In *Booth* the court affirmed a directed verd
dant for lack of evidence of violation of the CEA. Ir
court dismissed a suit by a customer against her
Section 4b for failure to comply with Rule 23.1 of Fe
Seligson the district court granted the Exchange su
ment on plaintiff's claim under Section 5(d). The
however, expressed the opinion that a cause of actio
citing *Deaktor*, *infra*. The Court of Appeals said nc
subject.[15]

Four of the remaining six cases upheld rights of
frauded customers against their brokers under Secti
the decision specifically upon the fact that defraud
were a class "especially" protected by Section 4b.[16] *G*
Hentz & Co., 265 F.Supp. 440 (N.D. Ill. 1967), the
decision upholding a cause of action for damages u
4b, was a class action by customers against their brok
primarily violations of Section 10b of the Securities E
(265 F.Supp. at 443), but also asserting a claim und
of the CEA. The court distinguished *Rosee* on the

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[15]In the last four of these cases, *obiter dicta* asserted tha
tion under the CEA existed, citing *Goodman*, *infra*, or it
judicial construction of a statute is not "settled" by mer
especially when based solely on wrongly decided preced
more, all but the last of these five cases were suits by c
tomers against their broker, so they could not be authorit
ence of implied causes of action in favor of non-customer
broker-petitioners. The fifth case (*Seligson*) did not invo
tion 4a, 4b or 9(b).

[16]*Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D.
derson v. *Francis I. duPont & Co.*, 291 F.Supp. 705 (D.
Arnold v. *Bache & Co., Inc.*, 377 F.Supp. 61 (M.D. F
McCurnin v. *Kohlmeyer & Co.*, 340 F.Supp. 1338 (E.D.

Rosee "was not a defrauded investor, as in the
ing out that defrauded customers "fall directl
persons Congress sought to protect by enact
the Commodities Exchange Act."[17] *Goodman*
soundly reasoned, would stand for no more th
customer may sue his broker for violation of

The remaining two cases relied on by t
relevant to the charges against these petitione
rely solely on the repudiated tort theory of li
held, relying solely on *Goodman*, that egg pro
tors such as plaintiffs here, could *enjoin* a pe
inaccurate market information in violation of
9(b) not relevant to the present case. The cou
that plaintiffs as producers "are within the cl
tended to protect from false, or misleading, o
rate reports" (311 F.Supp. at 1384); but the o
was an injunction and not an action for dam

In *Deaktor* two cases brought against an
CEA were consolidated. One alleged violati

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[17]This disposes of the majority opinion's assertio
eleven cases] stressed the broker-customer relatio
more, in its *dicta* in *Johnson* v. *Espey*, *supra*, the
6b . . . makes it unlawful for any member of a cor
or defraud or attempt to cheat or defraud' *person*
i.e. customers. (341 F.Supp. at 766; emphasis ad

[18]*United Egg Producers* v. *Bauer Int'l Corp.*, 3
N.Y. 1970); *Deaktor* v. *L. D. Schreiber & Co.*, 4
rev'd. sub nom. Chicago Mercantile Exchange v.
(1973).

[19]The majority opinion is mistaken (p. 4058 n.
existence of an implied cause of action for injun
includes a right to collect damages. In *Transan*
that, while a suit to rescind and for restitution c
statutory provision declaring certain agreemen
damage action was thereby implied.

and the other alleged violation of Section 9
peals, falling into the same error as the
framed the question overbroadly as: "whet
tions are allowable under the Commodity
stead of the questions (1) whether a priv
damages could be implied under Sectio
separately considered and (2) if so, in wh
such a right of action vested? The Court o
its error by answering affirmatively the ir
tion solely on the authority of the *Restate*
precedents afforded by *Goodman* and its
534), not one of which dealt with Section
which (*United Egg*) had considered wheth
a private remedy.

The *Deaktor* decision was reversed by th
that the entire matter should have been
Commodity Exchange Commission becau
and application of the Act" were issues to
instance" by the Commission (414 U.S. at
means "assumed" that "plaintiffs' clain
federal court," as the majority opinion as

Even if the issues in these cases had
eleven pre-1974 cases, those cases would
judicial interpretation since each was base
ated theory of tort liability. *Goodman* hel
cause of action for damages against their
violation of Section 4b on the principle set
the *Restatement of Torts* (265 F.Supp. a
rationalizes its result solely on the theory
standard of conduct set out in Section [4b
plaintiffs, as members of the class Congres
have a federal civil remedy. . . ." (265 F

man, applying the repudiated "tort t
ly mistaken view that:

> "Implied rights of action are n
> language which affirmatively ir
> ed. On the contrary, they are i
> evidences a contrary intention.

This, of course, violates the princip
considerations, that an implied right
evidence of a Congressional intent to
ly Congress can legislate.

Every one of the other ten cases wh
"[t]he unbroken line of decisions up
under pre-1974 law" relied upon the
man. These cases, therefore, are
precedential inbreeding." *U.S. Ind*
142, 150 (3d Cir. 1976).[21]

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[20]This was quoted from the *dissent* in
647 (1963) and was in turn a quote fron
man should have recognized that the tor
since it specifically relied on the dissent i
find an actionable tort in a violation of t
subpoenas was rejected. Mr. Justice Bre
violation of a federal statute could still g
of action" (373 U.S. at 657) despite *E*
ruling. By relying on the dissent in *W*
chose a rationale which had already be

[21]As Judge Mansfield wrote in his dis

> "*Goodman* . . . is significant not bec
> it is the case on which all of the la
> cause of action summarily relied."

Thus, *Goodman* was decided in 1967; *I*
Goodman, 283 F.Supp. at 437; *Ander*
Goodman, 291 F.Supp. at 710; *Booth*, 1
man, 430 F.2d at 133; *United Egg*, 1970
311 F.Supp. at 1384; *Johnson*, 1972, is b
Booth, and *Hecht*, 341 F.Supp. at 766

(Footnote continued

The eleven cases relied on by th
did not "settle" anything relevant
list omits persuasive decisions de
private rights; the pre-1974 cases
imous" as the majority opinion p
with the issue at all. Four conta
None advanced a rationale which
face of *Wheeldin* and *Amtrak*. N
statement by this Court. Only one
was reversed because the court w
had no initial jurisdiction. An ea
had denied the existence of an im
gle one of these cases attempte
Congress or to apply the tests lai
decisions. To the extent a rational
is the long-repudiated test of the

Sections 4a, 4b and 9(b) were e
if the state of the law in 1974 we
of 1936 enactments, the pre-1974
way provide a "settled" judicial i
of action existed under Section 4a
tomers of brokers whose interest
tors. *Not a single case had so he*

**G. Even If The Actions Of T
Relevant To The Ascertainm
Congress In Enacting Sectio**

(Footnote continued from previous
man, Booth and *Hecht*, 345 F.Supp
upon *Goodman, Anderson*, and *Boo*
1973, is based upon *Goodman, And*
McCurnin, 377 F.Supp. at 65; *Deak*
Anderson, Booth, United Egg, Johns
and *Seligson*, 1974, is based solely u
84.

Erred In Holding T
Decided That A Settl
nized Implied Rights
Sections And Intended

Even if the pre-1974 ca
sufficient in numbers, suffi
ly reasoned to support a cl
law, the next steps in th
Congress (1) knew about
definite and conclusive int
them as upholding rights
present cases, and (4) act
speculations, and are all r

I. No clear evidenc
Congress believe
causes of action
erroneous pre-19
and consciously
those erroneous

In support of its asserti
1974] Congress knew the
action and did nothing to
ion cites a small numbe
private actions. See Judge
assert that these opinio
Congress to assume that s
particularly that they spe
and 9(b) in favor of such
ligence of Congress.

But, if true, this means
the pre-1974 interpretati
predicated on the already
presumption in which the

presumed to have been a
Amtrak and to have kno
the majority opinion we
"settled" the issue.

**2. Congress must
Securities Acts
damages were i
sions in those A**

The majority opinion a
in assuming" that the dec
private rights of action '
CEA" (p. 4050). The ma
the fact that from the 1
spread, indeed almost ge
action for damages unc
Exchange Act" (p. 4047

Actually Congress had
of the Securities Acts cas
is *J. I. Case Co.* v. *Borak*,
ty opinion tells us, "domi

> "It appears clear th
> to bring suit for vio
> specifically grants t
> tion over 'all suits in
> force any liability o
> at 430-31).

Borak thus regarded Sec
tent to provide private ri
created under the Act.'
provision in the CEA is,
intent on the part of Co
under the CEA.[22] Th

[22]Nevertheless, the argur
the Securities Acts and the
ty opinion (pp. 4053, 4094

Court, in holding
statute there at is
tional language: '
. . . contains no ge
Moreover, in *Tra*
that the omission
with an intent on
action for damag
any general grant

**3. That the
private
ments w**

The 1974 Cong
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the broker-petitic
Congress provide
obtaining reparat
tion of any provi
provision is persua
such persons alrea
action did exist, t
necessary and me

Furthermore, th
existence of impl
CEA provides a t
under the Act. If a
ty would be shat
which would vary
Mayer & Co. v. *E*
implied private ca
requirement that
"before any form

requirement ex
CFTC may rev
in private actio
law as part of
futures trading

**4. The I
which
dama**

In 1974, Co
enact, a bill wh
to recover si
Damages" S.2
Court wrote th
ed a private
Congress did n
field's dissent a

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[27]This Court h
tant protection a
tion. *Blue Chip*

CONCLUSION

These cases raise important questions of the scope and construction of an important federal statute. The numerous decisions of the lower courts are in serious conflict; the issues raised should be resolved by this Court at this time. The joint petition for a writ of certiorari should be granted.[24]

Respectfully submitted,

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[24]Although the judgment which petitioners request this Court to review is nonfinal (the Court of Appeals having reversed an order granting petitioners' motions for summary judgment), this fact should not interfere with the granting of *certiorari* in view of the importance of the questions presented in this Petition and the Petition in *Curran*. This Petition raises important issues of law which are fundamental to the further conduct of these cases. This Court has granted *certiorari* in other cases under similar circumstances where those cases raised issues of equal importance. *E.g.*, *Transamerica*, *supra*; *Redington*, *supra*; *Blue Chip Stamps*, *supra*; Cf. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975).

APPENDIX

OPINION OF THE U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 402, 403, 404—September Term, 1979

(Argued January 16, 1980 Decided July 8, 1980)

Docket Nos. 79-7402, 79-7464, 79-7482

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—v.—

JOHN RICHARD SIMPLOT, J.R. SIMPLOT & CO., SIMPLOT PRODUCTS CO., INC., SIMPLOT INDUSTRIES, INC., SIMTAG FARMS, INC., PETER J. TAGGARES, P. J. TAGGARES & CO., HENRY A. POLLACK, HARVEY B. POLLACK, HARVEY B. POLLACK COMPANY, GERALD RAFFERTY, PRESSNER TRADING CORP., BENJAMIN PRESSNER, STEPHEN SUNDHEIMER, JULES NORDLIGHT, EDELSTEIN & CO., INC., CHARLES EDELSTEIN, ROBERT EDELSTEIN, MURIAL EDELSTEIN, MEIERFELD & COMPANY, INC., GILBERT MEIERFELD, DAVID MEIERFELD, ROBERT REARDON, F.J. REARDON, INC., HAROLD COLLINS, CASPAR MAYERSON, LYNNEWOOD EXPORTING COMPANY, ALEX SINCLAIR, MANNING STOLLER, HORNBLOWER & WEEKS-HEMPHILL, NOYES INC., MFX COMMODITIES, INC., DONALD SILVER, DUANE SOUTH, KENNETH RAMM, A & B FARMING INC., HUGH GLENN, GEARHEART FARMING INC., EDWARD MCKAY, "JOHN" HUMPHREYS, FRANK FULLMER,

Defendants

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., H
COMMODITIES, INC., THOMPSON & MCKINNON, A
CLOSS, KOHLMEYER, INC., NEW YORK MERC
EXCHANGE, RICHARD B. LEVINE, HOWARD G
ALFRED PENNISI,

Defendants-App

INCOMCO,

Plaintiff-App

—v.—

WAYNE COUNTY PRODUCE CO., and HAROLD COI

Defen

NEW YORK MERCANTILE EXCHANGE,

Defendant-Ap

NATIONAL SUPER SPUDS, INC., WILLIAM R. BUSTE
WILLARD C. CHINER, EUGENE P. WEISMEN, R
WELTS, RAYMOND ROTHBERG, ARTHUR S. ARMS
THEODORE BRINEK, CAPGAIN HOLDINGS, INC., an
ROMMINGER, individually and on behalf of all p
similarly situated,

Plaintiffs-Appe

—v.—

NEW YORK MERCANTILE EXCHANGE, CLAYTON BROK
CO. OF ST. LOUIS, INC., PRESSNER TRADING

JACK RICHARD SIMPLOT, J.R. SIMPLOT CO., INDUSTRIES, INC., PETER J. TAGGARES, P.J. T CO., C.L. OTTER, SIMTAG FARMS, KENNETH R & B FARMS, INC., HUGH V. GLENN, GE FARMING, INC. and ED MCKAY,

Defe

HEINOLD COMMODITIES, INC., THOMPSON & MCK AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Ap

Before:

FRIENDLY, MANSFIELD and KEARSE,
Circuit

Appeal from an order of the District Court Southern District of New York, Lloyd F. Ma *Judge*, 470 F.Supp. 1256 (1979), granting summary judgment to the New York M Exchange and three futures commission me defendants in three consolidated actions plaintiffs claimed damages arising out of the de sellers of the May 1976 Maine potato futures c on the ground that there is no private cause for damages under the Commodity Exchange U.S.C. §§ 1-19.

Reversed.

LEONARD TOBOROFF, Esq., Ne
(Robson & Toboroff, New
for Plaintiffs-Appellants
Philip Smith and Incomc

POMERANTZ, LEVY, HAUDEK &
York, N.Y. and
HOLLINSHEAD and MENDELSON
Pa., *for Class Plaintiffs-A*

WILLIAM E. HEGARTY, Esq., Ne
(Cahill Gordon & Reindel
N.Y., Charles Platto, Es
Leight, Esq., Of Counsel)
REIN, MOUND & COTTON, New
(Maurice Mound, Esq., Of
Defendants-Appellees Neu
cantile Exchange, Richar
Howard Gabler and Alfre

LAWRENCE H. HUNT, Esq.,
(Sidley & Austin, Chicago
DEWEY, BALLANTINE, BUSHBY
WOOD, New York, N.Y. *f*
Appellee Heinold Commod

W. STANLEY WALCH, Esq., St
souri (Thompson & Mitch
Missouri, Gerard K. Sandv
Kenton E. Knickmeyer, E
sel) *for Defendant-Appe*
Brokerage Co. of St. Loui

HALL, MCNICHOL, HAMILTON, C
RAY, New York, N.Y. *fo*
Appellee Thomson McKi
closs Kohlmeyer Inc.

MARK D. YOUNG, Esq., W
(John G. Gaine, General
Nicolette, Deputy Gener
Gregory C. Glynn, As
Counsel, Washington, D.
for Amicus Curiae Com
Trading Commission.

FRIENDLY, Circuit Judge:

Plaintiffs in three consolidated action
Court for the Southern District of Ne
from an order of Judge, now Chief Jud
470 F.Supp. 1256 (1979), granting ap
for partial summary judgment. The co
the complaints all claims based on
Exchange Act, (CEA), 7 U.S.C. §§ 1-19
1974, as distinguished from other cl
antitrust laws. The actions were to r
allegedly suffered by the plaintiffs as
Judge MacMahon characterized as

> the much publicized default in May
> potato futures contracts, when the
> 1,000 contracts failed to deliver
> 50,000,000 pounds of potatoes, r
> largest default in the history
> futures trading in this country.
> 1258 (footnote omitted).

The basis for the court's order was
cause of action exists for breach of the
important issue has divided the
including those within our circuit, we

to discuss it in some detail.[1] We
did the district court, to begin w
the nature of the commodity fut

I. COMMODITY FUTURE

A commodity futures contract
executory agreement for the pur
particular commodity. The sell
commits himself to deliver the c
date in the future, while the bu
then to accept delivery and pay
Bromberg & Lowenfels, Securities
ties Fraud § 4.6 (421)(1979); H. R.
Cong., 2d Sess. 130 (1974). Every
contract is standardized except pr
contract involved in this case, t
potato futures contract, is for 50,
grown potatoes of a specified qual
specified points in cars of the
Railroad, between May 7 and May
is the only variable, negotiations
and the agreed prices can be spe

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1 The length of our treatment, particu
nature of the Commodities Futures Mar
of congressional regulation in Part III, i
that when the case was argued and for
opinion was prepared, no court of appeal
and we anticipated being the first to
decided May 12, 1980, a divided panel
the Sixth Circuit reached the issue *sua*
and succinct opinion, held, as we do, on
that there is an implied private right
Curran v. *Merrill Lynch, Pierce, Fenn*
1300, SRLR (BNA) G-1 (May 12, 1980)
dissent, *Curran* involved a suit by a cu
court did not limit its reasoning to th

other traders. Standardization al
fungible. Original sellers and
offset their positions by acquiri
either paying or gaining any p
Rep. No. 93-975, *supra*, at 130.

The person who has sold a
someone committed to deliver
future, is said to be in a "short
someone committed to accept de
rare case, however, in which actu
pursuant to a futures contract
instances, the short and the lon
positions prior to the close of tr
futures contract. Although the
done is routinely referred to as f
contracts are not "traded" in th
word. Rather they are formed
Genealogy and Genetics of "C
Commodity for Future Deliver
Exchange Act, 27 Emory L. J.
person seeking to liquidate his

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2 See H. R. Rep. No. 93-975, *supra*
futures contracts culminate in delive
of Futures Trading 41 (1977) (less tha
investor nor the person using the futu
position in the market for the actua
delivery. H. R. Rep. N. 93-975, *supra*,
Inc. v. *Freeman*, 311 F.2d 52, 55-
Delivery Requirement: An Illusory B
tion in Commodity Exchanges 73 Ya

In occasional instances, however, pe
an alternative market for the physic
93-975, *supra*, at 132. Delivery is ma
by transfer of warehouse receipts or ri
then transported according to the
Cargill, Inc. v. *Hardin*, 452 F.2d 11
denied, 406 U.S. 932 (1972).

form an opposite contra
that his obligations unde
each other. Thus, a short
the commodity must purc
contracts; a long must s
contracts. Money is m
differential between the
offsetting transaction. If
declined, usually because
cating a drop in the price
will realize a profit; if th
long will realize a profit
452 F.2d 1154, 1157 (8
U.S. 932 (1972). Futures
Since money is made
contract prices, and ever
short, every gain can be
loss. See Melamed, *The*
Futures Exchange: A Cr
Transaction Process, 6 Ho
(1977).

The mechanics of the c
the roles of the various p
by tracing a typical trans
to invest in the futures
commission merchant" (F
Commodity Exchange Act
"engaged in soliciting or
purchase or sale of any c
. . . on . . . any contra
U.S.C. § 2, and they are r
Futures Trading Commi
demand a "margin" paym
is simply a security depo
adverse price movements

based upon the amount
a day or two; when the
will call the customer
margin is generally only
of the contract. See Mel
at 167 & n.41. FCM's
customer's business.

The FCM relays its
"floor brokers" trading
stands on the outside of
are gathered other p
contract. Some of the
behalf of customers, wh
account. Contracts are
broker with an order wil
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signals. Someone willing
across the pit in similar
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transaction and feed the
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event, had an opportuni
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the FCM, who informs

When two traders ha
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comes into play. The c
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the interchangeability
ling of positions. H. R.
S. Rep. No. 93-1131,
Cargill, Inc. v. *Hardin*,
FCM's are clearinghous

must deal through
FCM's as princip
demands margin p
house requires FC
close of every tradi
the FCM has sust
trading is computed
accordingly. Melam
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Generally speakin
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of transferring risks
R. Rep. No. 93-975
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17 C.F.R. § 1.3(z). T
against declining p
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No. 93-975, *supra*,
supra, 452 F.2d at
at 171-73. The bene
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business, he is ab
with consequent
Rep. No. 93-975,
93-1131, *supra*,
Regulation of t
Harv. J. Legis. 3

The system w
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Trading: Specula
Rev. 27, 32 (197
F.2d at 1158.
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> The principa
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3 Johnston, *Unde*
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II. THE ALLEGED FACTS AND THE PROCEEDINGS BELOW

The facts alleged in the three complaints here before us are broadly as follows:[4]

John Richard Simplot is an Idaho potato entrepreneur who controls J. R. Simplot and Co., Simplot Products Co., Inc., and Simplot Industries, Inc. These corporations are responsible for the processing of approximately 50% of all Idaho potato products processed and sold in the United States. Peter J. Taggares is a Washington potato entrepreneur. He and his company, P. J. Taggares Co., process approximately 30% of all the Washington potatoes processed and sold in this country. Simplot and Taggares are equal partners in the ownership of Simtag Farms, a large farm in the State of Washington for the growing and warehousing of potatoes. Together Simplot, Taggares, and the companies they control are the largest purchasers of potatoes throughout the western potato region of Washington, Idaho and Oregon.

According to the complaints, Simplot, Taggares, and the companies controlled by them, together with numerous co-conspirators, embarked in the spring of 1976 on a conspiracy to depress the price of the May 1976 Maine potato futures contract traded on the floor of the New York Mercantile Exchange (the "short conspiracy"). As stated by one of the complaints, "[b]y virtue of their position in the potato processing field and the quantity of potatoes purchased by them, [the

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4 We say here once and for all that our statement, in large measure, is simply what the plaintiffs contend to be the facts and is not to be read as one of facts found. Accordingly we will generally dispense with use of words such as "allegedly", "asserted" and "claimed".

conspirators] would be in a position to control the prices paid for potatoes but for the existence of the Exchange and the activity . . . in buying and selling potato futures contracts." Simplot had encountered difficulties in the course of his customary negotiations with the Idaho Potato Growers Association, because the IPGA believed that the price of potatoes, including Maine potatoes, would be much higher than what Simplot was offering. Futures prices supported this view. A report issued on April 13, 1976 by the United States Department of Agriculture indicated that total potato stocks were down 11%, and that Maine stocks totalled only 7.4 million cwt. compared with 13.0 million cwt. on hand the previous year. An earlier report issued in August 1975 estimated that national potato acreage would be down 8% from the previous year with an even greater drop in Maine. The effect of this latter report, and other generally available information, was to drive the price of the May 1976 Maine contract from $9.75 per cwt. to a record high of $19.15 per cwt. by October 3, 1975. The activities of the short conspirators were designed to counteract the impact of these reports and other market information and rumors tending to raise the price of Maine futures. A decline in the price of potato futures would suggest to those dealing in the cash market, such as the IPGA, that supplies of Maine potatoes would be greater than earlier anticipated, and that prices in spot transactions or negotiations for all potatoes should correspondingly recede.

The primary means by which the short conspirators sought to depress the futures price was the accumulation of a large net short position in the May contract. The conspirators allegedly agreed to sell a large number

of contracts short and to refuse to liquidate these shorts at a price higher than that agreed among themselves and, if necessary, to default on the obligation to make delivery on all unliquidated contracts. Such short purchases would give the impression of the existence of a large supply of deliverable Maine potatoes and drive down the price of the contract.

Simplot made $1 million available to Simtag Farms, which Simtag used to open a credit balance on March 29, 1976, with Pressner Trading Corp., a member of the New York Mercantile Exchange (the Exchange or NYME), for the purpose of buying and maintaining short positions in the May contract. At the same time, Simplot, Taggares and their other companies also began to accumulate a large number of short contracts. The brokers through which the conspirators acquired their positions included Clayton Brokerage Co. of St. Louis, Inc. (Clayton), Heinold Commodities, Inc. (Heinold), and Thompson & McKinnon, Auchincloss, Kohlmeyer, Inc. (Thompson). These three brokerage firms were, like Pressner Trading, clearing members of the Exchange and appropriately registered with the CFTC. The firms allegedly knew, or should have known, that their customers neither intended to nor would be able to cover the large number of short positions the brokers acquired for them.

On May 4, 1976, Simplot and Taggares were warned by the CFTC that it was aware of their large short position and that price manipulation was a violation of the Commodity Exchange Act. The telegram concluded that although this "is not an allegation of price manipulation, if prices of the May 1976 potato future . . . should become artificial during liquidation due to

your action or inaction, we will consider whethe
and your firm should be charged with price mar
tion under the Commodity Exchange Act." In th
of this warning, and the impending close of trad
May 7, the conspirators not only failed to take st
liquidate their large short position but ac
increased it, again with the help and support
named brokerage firms. On the last day of tradin
consolidated all the short positions they control
the hands of Pressner. Clayton, Thompson and H
knowingly acquiesced in this consolidation desig
concentrate the force of the manipulation.

In addition to the accumulation of a large net
position which they refused to liquidate at highe
an agreed price, the conspirators also all
manipulated the futures price by shipping
quantities of unsold Idaho potatoes to the
markets for immediate sale at the going price. T
of such so-called "roller cars", railroad cars of po
shipped although there is no pre-determined
tends to depress the market price, and thus
futures prices.

Simplot and Taggares were not the only
manipulating the price of the May future. A
group of eastern conspirators thought they coul
the western producers at their own game.
Collins and Casper Mayrsohn are Maine
merchants and traders in Maine futures. MFX
modities, Inc., with Donald Silver as its presider
foreign corporation engaged in business as a FCM
group learned of the conspiracy of Simplo
Taggares and conspired to squeeze them. Pursu
this conspiracy (the "long conspiracy"), the "long"
purchased as many contracts as it could, and t

the same time maneuvered to tie up the cash market so that the shorts could not make delive longs reasoned that if the shorts had no ac deliverable potatoes, the longs would be able to the price the shorts would have to pay to liquida contracts. The main way in which the longs tied cash markets was by tying up all of the rail car Bangor & Aroostook Railroad, which alone deliver potatoes to satisfy May futures contract was done by using the cars for phony export shi and leaving them loaded or only partially u when they reached appropriate destinations.

Neither the longs nor the shorts would give in other. The shorts refused to liquidate their posi buying offsetting long contracts at higher th price agreed among them; the longs refused t down to the unreasonably low price demanded shorts. At the end of trading on May 7, th conspirators controlled 1893 open short positio long conspirators controlled 911 open long po There are usually only approximately 20 contracts at the end of trading on the May future.

The plaintiffs were caught in the middle b these two competing conspiracies. Neil Leist is licensed member of the Exchange engaged business of trading commodities and futures own account. Incomco, a partnership, is a duly FCM. Philip Smith is Incomco's managing partn class action plaintiffs are traders and dealers re ing all persons "who held a net long posi Contracts and who liquidated their long position contract between April 13, 1976 and the trading on the Exchange on May 7, 1976."

On the basis of the same sort of inf
motivated Simplot and Taggares to con
the price of the contract, plaintiffs bel
an investment opportunity on the lo
contract. If there was going to be
deliverable Maine round whites, thos
deliver potatoes at a set price might wel
to be under what the potatoes were wo
would then have to sustain a loss, eithe
potatoes in the cash market for the h
delivering them for the lower futures co
by purchasing an offsetting long positi
the long position should have gone
shortage, so that the shorts would lose
in liquidating. The shorts' loss would be
and it is this gain which the plaintiffs s
by their investment.

All the plaintiffs invested heavily on
the May contract. In addition, Incom
position in the cash market. It had acc
pounds of Maine potatoes delivered to
the March futures contract, and plann
potatoes to those short the May contr
supplies to satisfy their delivery obligat
ing a cash market shortage, Incomco ex
potatoes at a handsome premium.

Because of the conspiracies, howeve
only did not realize the gains they cl
have had in an unmanipulated mark
losses. The short conspirators continue
short positions when they should have
liquidate by purchasing long contracts
and refused to liquidate above a set pric
the unnaturally falling price, the plaint

out of the market at a loss. Bec
conspirators had successfully tied up all
of the Bangor & Aroostook, Incomco
deliver its warehoused potatoes to p
delivery to fulfill short contracts. As the
set in, the 1,500,000 pounds of potatoes
and Incomco's total investment was los

The Exchange allegedly figured in this
from the start. In March, Richard Levi
the Exchange, told plaintiff Leist that
was investigating the large number of o
the May contract. On April 28, two m
CFTC eastern region office, Howard B
Marshall Horn, met with Levine and H
vice-president of the Exchange, to expre
over the problems developing with the
Levine recognized the problem and exp
that Simplot might be trying to create
the contract. A second meeting took
later, at which Bodenhamer told Le
Commissioners felt that "the Exchan
more action than less to bring about
tions of the maturing futures."

Levine did not report these meetings
to the Exchange's Board of Governors
close of trading on the May contract.
Exchange knew, or should have know
short and the long conspiracies, it too
prevent manipulation of the market.
failed to declare an emergency situation
rules to facilitate orderly liquidation, an
had closed, failed to take appropriate
permitting delivery by truck or buyi
cover the default of the shorts.

The complaint in *Leist* v. *Sim*
District Court for the Southern Di
September 30, 1976. Count I, dire
conspirators and their brokers
activities of the group constituted
§§ 1-13 and, more specifically, th
employed manipulative devices
violation of 7 U.S.C. § 13, which
felony, and of rules promulgat
addition to naming the brokers as
specifically alleged that they "fa
enter liquidating orders" for th
prior to the close of trading "ev
that such short positions could no
there would be a default if the acc
out", permitted the short sale
cooperated in making such short
knew or should have known tha
intend to and would be unable
positions." Count II of the comp
violations of the Sherman Anti
§§ 1, 2, which are not subject t
Count III was directed against t
describing the facts outlined abo
such conduct violated 7 U.S.C. §
directed against the Exchange a
repeating the earlier general al
short conspirators, the complain
defendants "negligently failed to
market for trading in Maine Futu
duties imposed upon them under
Act." The Exchange was also ch
report the various violations alle

and with failing to direct the
orders for the account of mer
positions prior to the close of tr
Exchange officials knew or shoul
sellers would not and could not
positions remained open.

The complaint in *Incomco* v.
Exchange was filed in the Di
Southern District of New York o
complaint was directed at the lon
Exchange, "acting separately and
the long conspirators, for "block
railroad cars, thereby creatin
manipulative railroad car shorta
Commodity Exchange Act, and
for failing to follow its own regu
buy in the cash market for the
sellers so that outstanding obliga
As in *Leist* v. *Simplot*, plaint
antitrust charge.

The complaint in *National Sup*
Mercantile Exchange was filed in
the Southern District of New Y
After consolidation with other ac
this class action complaint charge
the short sellers described above
ble provisions of the Commodity
manipulative force which artific
of the Contract." Count II cha
with exceeding position and tra
CFTC in 17 C.F.R. § 150.10. C
against the brokers for the short

with violating Exchange l
have liquidating orders pl
should have known that
deliver potatoes, permittin
position and trading limit
failing to report these and
regulations, and Exchange
which they knew or sho
generally charged that the
intent of short Sellers t
Contract acquiesced and/o
Short Sellers." Count VI w
charging that it failed a
concealed violations of the
rules; failed and neglecte
orders be entered with re
Exchange knew or should
generally failed and neglec

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5 This reads as follows:

44.02-FINAL DAY OF TR

(a) On the final day of tr
the responsibility of each
position to fulfill his con
contract by prescribed not
order entered on the Exch
before the time established
month. All such orders sh
prior to the expiration of

(b) On the final day of t
no time limit or contingen
will not be expected to ass
orders placed later than 15

(c) Cancellations that re
hour prior to the time tra
day of trading in an expi
problems and hence will
customer.

contract market; and fail
due care to halt manip
actions, all claiming e
punitive damages, were c

After answers had been
had been had, one phas
attention of this court,
New York Mercantile Ex
1979), three brokers, Cla
and the Exchange and Ex
different actions for judg
Fed. R. Civ. P. 12(c) or,
summary judgment unde
he believed that all the
material outside the plead
motions under Rule 5
dispositive reasons so far
the Commodity Exchange
raised by the Exchange,
Thompson, seem to have
could have been raised as
been filed two years ear
issued on May 29, 197
MacMahon held that th
action for damages und
Act, and granted summa
moving defendants on t
under that Act.[6] Partial
under Fed. R. Civ. P. 5
defendants, and the plain

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6 For a precise statement o
470 F.Supp. at 1257 n.1, 1

III. THE HI

COMMOI

Although our ir
modity Exchange
useful at this po
Congressional regu

The first effort
Trading Act, 42 S
basic pattern of al
trading on central
and control of th
levied a tax on all
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Agriculture was
trade as a "contrac
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§ 5(d), 42 Stat.
virtually unchange
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private right of a
also empowered
Secretary of Agri
the Attorney Ge
designation of any
the conditions of
and to preclude
attempting to m
designated contra
Failure to pay th
records made the
a fine of up to $1
one year. § 10, 4

The Future T
unconstitutional
Wallace, 259
immediately and
Stat. 998 (192
deleted, and Co
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in futures contr
§ 4, 42 Stat. 99
of the 1921 act
penalties now ac
the failure to p
added, § 3, 42 S
over virtually u
U.S.C. § 5. The
exercise of the
Olsen, 262 U.S.
established the
designated exch
controlling desig
markets. The
violations was a

Major addition
by the Commodi
Coverage was
commodities suc
4a was added,
Secretary of Ag
Attorney Genera
tive trading.[7] H

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7 This provision

(1) Excessiv
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C.F.R. § 15
Stat. 1493,

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present form.[8] New section 4d required the registration of FCM's and section 4e of floor brokers, while section 4g provided for the suspension or revocation of these registrations for violation of the Act or rules adopted thereunder. Section 5a added new duties of reporting for contract markets and some substantive obligations as well. Fines and imprisonment sanctions were extended to cover violations of the newly enacted provisions as well as old § 4, and were also applied to

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8 This provision currently reads as follows:

> It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—
>
> (A) to cheat or defraud or attempt to cheat or defraud such other person;
>
> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
>
> (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or exchange of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or
>
> (D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

anyone attempting to manipulate or manipulating the price of any commodity. 49 Stat. 1501.

By 1936, then, the major provisions which assertedly form the bases of the implied right of action against the FCM's, the trading limit, antifraud, and antimanipulation provisions, were already in place. One of the two additional provisions allegedly affording the basis for an action against the Exchange, § 5(d), had been law since 1921 and the other, § 5a(8), would be added in 1968.

The 1968 amendments, 82 Stat. 26, extended regulation to new commodities such as live cattle and pork bellies. The amendments added § 5a(8), as noted above, requiring a contract market to enforce all of its rules not disapproved by the Secretary of Agriculture.[9] Corresponding § 8a(7) was added empowering the Secretary to disapprove rules which violate or will violate the act or regulations. The penalty provision was altered somewhat, making FCM embezzlement and price manipulation felonies instead of misdemeanors, with a maximum prison term of five years instead of one. 82 Stat. 33-34. Section 6b was added, granting the Secretary the power to issue cease and desist orders against a contract market not enforcing its rules or violating the act. 82 Stat. 31-32.

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9 This provision currently reads as follows:

> (8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of section 5a of this Act; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission.

In contrast to the limited scope of the 196 amendments, the 1974 amendments, 88 Stat. 138 (1974), constituted a complete overhaul of the Act They broadened its coverage from the agricultura commodities with which it had historically bee concerned to include "all other goods and articles . . and all services, rights, and interests in which contract for future delivery are presently or in the future deal in", subject to certain exceptions designed primarily t exclude securities. Consistently with this expansion i coverage, enforcement was transferred from th Department of Agriculture to a newly constitute Commodity Futures Trading Commission (CFTC). How ever, the amendments did not substantially alter any o the provisions which assertedly form the bases of a implied right of action. The antifraud and tradin limits sections were basically unchanged. Maximun fines were increased from $10,000 to $100,000 in th penalty section.[10] Section 5(d), requiring a contrac

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10 This provision currently reads as follows:

It shall be a felony punishable by a fine of not more tha $500,000 or imprisonment for not more than five years, or both together, with the costs of prosecution, for any person t manipulate or attempt to manipulate the price of any commodit in interstate commerce, or for future delivery on or subject to th rules of any contract market, or to corner or to attempt to corne any such commodity, or knowingly to deliver or cause to b delivered for tranamission through the mails or in interstat commerce by telegraph, telephone, wireless, or other means o communication false or misleading or knowingly inaccurat reports concerning crop or market information or conditions tha affect or tend to affect the price of any commodity in interstat commerce or knowingly to violate the provisions of section 4 section 4b, section 4c(b) through section 4c(e), section 4h, sectio 4o(1), or section 19 of this Act, or knowingly to make any false o misleading statement of a material fact in any registratio application or report filed with the Commission, or knowingly t omit in any application or report any material fact that i

market as a condition of designation, to p
manipulation and cornering, remained unchang
§ 5a(8) was altered so that exchanges were requ
enforce their rules *approved* by the CFTC rath
those rules not *disapproved* by the Secretary.

The 1974 amendments required contract mar
provide arbitration procedures for settlement
tomer grievances and claims not exceeding $
§ 5a(11). The CFTC was vested with power to
exchanges to adopt additional rules, § 8a(7),
bring actions to enjoin violations of the Act and
compliance through writs of mandamus, § 6c.
the reparations procedure in § 14 was establis
which more hereafter.

The history of congressional concern with com
futures trading has thus been one of steady ex
in coverage and strengthening of regulation. I
1968, and 1974 new commodities came under th
In each of these years the power of the reg
authority were augmented, and penalties were
extended, increased, or both. The question of C
sional intent with respect to private sanctions
the Act must be considered against this backgr
increasingly strong regulation designed to ins
existence of fair and orderly markets.

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required to be stated therein. Notwithstanding the for
the case of any violation described in the foregoing sent
person who is an individual, the fine shall not be n
$100,000, together with the costs of prosecution.

IV. PRIVATE CAUSES OF ACTION UNDI COMMODITY EXCHANGE ACT PRIOR THE 1974 AMENDMENT

During the late 1940's, the 1950's, the 1960'; early 1970's there was widespread, indeed general, recognition of implied causes of a damages under many provisions of the S Exchange Act, including not only the provisions, §§ 10 and 15(c)(1), see *Kardon* v. *Gypsum Co.*, 69 F.Supp. 512, 513-14 (E.D. P *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 78 Cir. 1951) (Frank, J.); *Fratt* v. *Robinson*, 203 631-33 (9 Cir. 1953), but many others. These the provision, § 6(a)(1), requiring securities e to enforce compliance with the Act and any regulation made thereunder, see *Baird* v. *Fran* F.2d 238, 239, 240, 244-45 (2 Cir.), *cert. de* U.S. 737 (1944),[11] and provisions goverr

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11 While the point is of no great importance as regards t take issue with the statements in the dissent, page 38, t *Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2 Cir.), *cert.* U.S. 81 (1966), held that violation of a rule of the New Exchange could not give rise to an implied cause of conclusion was that violation of certain types of rules wo to an implied cause of action, especially "when the rule explicit duty unknown to the common law", but that viol rule there at issue, requiring brokers to observe "just a principles of trade", did not. *Id.* at 182-83. We likewise d the statement in footnote 8 that "it is now well recogr private right of action may not be implied for a violation the New York Stock Exchange," citing *Jablon* v. *Dean W* 614 F.2d 677 (9 Cir. 1980). Although the particular rul *Jablon*, the "know your customer" rule, Rule 405 of th Stock Exchange, seems analogous to the rule at issue *Realty* and we thus have no quarrel with the result, necessarily accept the broad language of the *Jablon* opin of our conclusion that plaintiffs have alleged violatio sections of the Act which give rise to private cl

solicitation of proxies, see *J. I. Case Co.*
U.S. 426, 431-35 (1964). The *Baird* cas
importance since the claim was of failu
York Stock Exchange to perform its d
paralleling that asserted here against N
in 1961, Professor Loss remarked wi
violations of the antifraud provisions
exception "not a single judge has expres
the contrary." 3 Securities Regulation 17
Bromberg & Lowenfels, *supra*, § 2.2 (4
1946-1974 as the "expansion era" in im
action under the securities laws). When
for violation of § 10(b) and Rule 10b-
Supreme Court, the existence of an im
action was not deemed worthy of exten
Superintendent of Insurance v. *Ba*
Casualty Co., 404 U.S. 6 (1971); *Affiliat*
v. *United States*, 406 U.S. 128 (1972).[12]

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unnecessary for us now to decide whether such
for violation of NYME Rule § 44.02.

So far as concerns the dissent's citation of *O*
F.2d 764 (2 Cir. 1964), as a case denying a priv
the securities area, that decision rested on the
and in no way challenged the proposition tha
action would lie if the facts came within the

12 Indeed, at the time Congress considered a
amendments to the CEA, the Supreme Court
request to imply a cause of action under the fe
Pitt, *Standing to Sue Under the Williams Act*
Bus. Law. 117, 121 (1978).

The suggestion in the dissent that the *Superin*
case was a grudging acquiescence in 25 y
decisions, although finding some support in a
404 U.S. at 13 n.9, ignores the language
Superintendent of Insurance and the climat
Supreme Court there reversed a decision of t
apply § 10(b) under circumstances which press
absolute limit. The Court quoted not simply in a

causes of action under other statutes
the SEC were also widely recogn
Goldstein v. *Groesbeck*, 142 F.2d 422,
cert. denied, 323 U.S. 737 (1944)
Holding Company Act); *Cogan* v.
F.Supp. 907 (S.D.N.Y. 1958); *Schwartz*
F.Supp. 361 (S.D.N.Y. 1957), appea
holding on this point approved, *Schwa*
F.2d 195, 197-98 & n.5 (2 Cir. 1959); *B*
194 F.Supp. 207, 220-21 (S.D.N.
appellant conceding this point, 294 F
Cir. 1961)(Investment Company Act);[13]
v. *Marine Midland Grace Trust Co.*, 4
n.5 (2 Cir. 1971)(dictum), aff'd 406 U.
(1972)(Trust Indenture Act). These stat

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strong approval the statement in *Shell* v. *He*
827 (5 Cir. 1970):

> When a person who is dealing with a cor
> transaction denies the corporation's direct
> information known to him, the corporat
> availing itself of an informed judgment on
> regarding the merits of the transaction.
> private right of action recognized under Ru
> a remedy for the corporate disability.

And all this under a statute which *expressly*
actions, §§ 9(e), 16(b) and 18, with respect
securities transactions that were far more
reparations procedure of the 1974 amendmen
Loss, Securities Regulation at 3689-73 (196
this and other reasons the *Borak* decision
preclude a different ruling with respect to the
cause of action under § 10(b)—a ruling whic

13 Indeed, in several important cases under the
Act, defendants represented by able counsel
worthwhile to question the existence of an in
action. See, e.g., *Rosenfeld* v. *Black*, 445 F.
cert. dismissed 409 U.S. 802 (1972); *Moses* v.
(1 Cir.), *cert. denied* 404 U.S. 994 (1971); *F*
F.2d 731 (2 Cir. 1975), *cert. denied*, 429 U.

panoply of other remedies—enf
suspension, civil fines, crimina
express private actions—which,
the administrative reparations re
of violator, were every bit as o
those in the CEA, but argument
negated an implied private c
regularly and firmly rejected, s
much cited opinion in *Baird* v.
F.2d at 244-45; *Goldstein* v. *Groe*
at 426-27; *Fratt* v. *Robinson, su*
Dann v. *Studebaker-Packard Cor*
09 (6 Cir. 1961). The question h
these decisions were wrong in
Court opinions of the past four
necessarily implies, but whether
not justified in assuming they w
respect to the CEA.

Neither the generality and ne
interpretations of statutes regul
practices, for which the CEA v
respect to futures trading,[14] no

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14 While there are differences bet
securities fields, what is relevant to
common legislative objective of insurin
what are important public markets,
approach to attaining this objective.
fields has been repeatedly recognized
No. 93-1131, *supra*, at 19; H. R. Rep.
1936 amendments arose from an expli
in the commodities field as strong as
lest the unscrupulous would simply t
one market to another. H. R. Rep. No
(1934); 78 Cong. Rec. 10446 (June 4,
Jones of the House Committee on Ag
(June 3, 1935) (same). The analogy ha
the courts, see, e.g., *Silverman* v. *CF*

other fields, e.g., *Reitmeister* 691 (2 Cir. 1947)(action for statute making interception crime)(L. Hand, J.); *Fitzgerald Airways*, 229 F.2d 499 (2 damages implied from anti-dis Civil Aeronautics Act althoug complaint to CAB and crimin novel. They rested on principl Supreme Court decisions going *R. Co. v. Rigsby*, 241 U.S. 33 the right of a switchman t violation of the Federal Safety the only express sanctions wer stated:

> A disregard of the comm wrongful act, and where it of the class for whose esp was enacted, the right to r party in default is implied of the common law expre Action upon Statute (F), every case, where a statu thing for the benefit of a

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1977) (quoting Moore, J., in *Savag* Cir. 197); *P. J. Taggares Co.* v. (S.D.N.Y. 1979) (Weinfeld, J.); by *curiae* at 12; and by the comme Meltzer, *Secondary Liability Unde* 27 Emory L. J. 1115 (1978); No *Commodity Futures Investors*, 55 Congress was not only aware of the CEA in 1974, as shown below, b private right of action recognized i regulation.

remedy upon the
enacted for his adva
a wrong done to hin
Holt, C.J., *Anon.*, 6

Following *Rigsby* the S
plied causes of action o
Wyandotte Transportat
U.S. 191 (1967) (sustain
United States for dama
Act for removing ne
express remedies of
penalties); *United State*
U.S. 482 (1960) (sustain
United States for an in
Harbors Act); *Tunstal*
Enginemen, 323 U.S.
cause of action by uni
discrimination among
Board of Mediation); *S*
Inc., 396 U.S. 229 (19
cause of action under 4
Board of Elections, 39
implied private cause of
Rights Act despite
regulatory scheme and
Attorney General); and,
decisions under the se
Court itself has recogniz
early 1970's was on
consistently found im
University of Chicago,
718 (Rehnquist, J., co

Case Co. v. Borak . . .
federal courts, gave Co
the federal judiciary w
generally Note, *Implyi*
Regulatory Statutes, 7

Given so many cases
under a broad range of
instance of the securi
supported by a good
decisions and the rea
scarcely surprising tha
question prior to the
upheld the implicatio
under the CEA. Indeed
would have been alm
courts to have held

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15 Although it is true, as
v. *University of Chicago*
period, the Court frequen
imply causes of action fr
the same cases mentione
no doubt that particularl
statutes administered by
much taken for granted
See note 13 *supra*. There
itself, both before and af
v. *Peavey Company Com*
1970); *Ames* v. *Merrill*
F.2d 1174, 1176 (2 Cir.
cause of action under th
Dean Witter & Co., Inc.,
addition, several courts
precise contours of the p
of course by the securitie
implicitly that such an a
Produce Exchange, 434 U
Texas Cattle Managemen
v. *Bache & Co., Inc.*, 570
v. *NYME*, *supra*, 476 F.

remedies were a
claims for econ
important effort
ity futures ma
reported case, f
Goodman v. H.
1967).[16] The un
private right of
cases frm all of
commodity futur
& *Co.*, 291 F.Su
Harris, Upham &
1968), modified,
Egg Producers v.
1375, 1384 (S.D.
Commodity Serv
McCurnin v. Koh
(E.D. La. 1972),
v. Barnes Broke
(N.D. Tex. 1972)
Hamill & Co., 3

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16 The dissent's
trading had neve
which was "the
empirical basis.
Seligson v. *Neu*
1080, rendered i
"led to a string
past ten years."
confronted with
by the SEC, did
a private cause
in well-known c
to do so, see no

While we thin
are exaggerated,
extended it with
regarded these d
the law.

Arnold v. Bache
1973); *Deaktor*
534 (7 Cir.), *re*
Mercantile Exch
(per curiam); *Se*
378 F.Supp. 107
Miller v. New Y
Cir.), *cert. deni*

It is true that
a broker again
customer's acco
the Act, but nor
as either the ba
did *not* involve
customers. The
D. Schreiber &
grounds sub n
Deaktor, 414 U.
court. Plaintiffs
various member
lated the futur
violation of CE
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the *Deaktor* pla
to liquidate th
converse of the
The Exchange
§ 5a(8), 7 U.S.
exchange to "en
resolutions". Pl
Exchange with
futures market,
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§§ 52(8)
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existed

broker on his customer but for manipulation as well. The notion, strongly emphasized by the dissent, that such a decision escaped the knowledge of those framing the amendments, seriously underrates the expertise of our lawmakers and their staffs in subjects of particular concern to them.

Far from undermining the Seventh Circuit's recognition of an implied cause of action, the Supreme Court's reversal, 414 U.S. 113 (1973) (per curiam), on the ground that the court should have deferred to the primary jurisdiction of the Commission implicitly affirmed this recognition. Noting that " 'Congress has established a specialized agency that would determine either that a . . . rule of the Exchange has been violated or that it has been followed . . . ' ", the Court emphasized that " 'Either judgment would require determination of facts and the interpretation and application of the Act and Exchange rules . . . ' " and that " 'either determination will be of great help to the . . . court . . . . ' " *Id.* at 115, quoting *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 307 (1973). Thus the Court's reason for insisting on a determination by the Commission "in the first instance", 414 U.S. at 116, was that it would assist a court in hearing plaintiff's claims "in the second instance". The Court did not "decline to reach the issue" whether plaintiffs' claims were cognizable in federal court, as the dissent asserts (p. 40); it simply assumed that they were, as the Seventh Circuit had held.[16a]

Other cases upholding an implied cause of action outside the broker-customer relationship were *United*

16a Mr. Justice Stewart would have affirmed and allowed the action to proceed directly in the district court. 414 U.S. at 416.

Egg Producers v. Bauer International Corp., supra, 311 F.Supp. 1375, which recognized an implied cause of action under § 9(b) on behalf of various egg producers against an import-export firm, and *Seligson v. New York Produce Exchange, supra*, 378 F.Supp. 1076. *Seligson* arose out of the much-publicized "Salad Oil Swindle", and recognized an implied cause of action on behalf of the trustee in bankruptcy of a brokerage firm against the exchange, exchange officials, and the clearinghouse.[17]

While case based on pre-1974 facts decided after the 1974 amendment, apparently under pre-1974 law, are of less pertinence since the 1974 Congress could not have known of the decisions,[18] they deserve mention as

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17 We fail to appreciate the dissent's attempt to distinguish these two cases. With respect to *Egg Producers*, if implied private causes of action did not exist under the Act, there would be no cause of action for an injunction any more than there would be for damages. The *Seligson* decision was rendered before Senate consideration of the 1974 amendments and House repassage in the amended form. Moreover, what the dissent fails adequately to recognize is that the cases under the CEA, numerous and consistent as they are, cannot be taken in isolation but must be considered along with the vast body of law under the securities statutes which set the tone during the late '40's, the '50's, the '60's, and the early '70's, and on which the CEA decisions relied. The efforts to whittle all this away, pages 41-43, are unimpressive. We have already dealt, note 14 *supra*, with the argument as to the cases under Rule 10b-5. The contention that the securities legislation offered less in the way of remedies than the CEA would surprise most students of securities law; with the single exception of the 1974 reparations procedure for certain types of CEA violations, whose inadequacies are described below, they offered more. The argument that the sections of the CEA most heavily relied upon by plaintiffs were enacted before the explosion of the private right of action under the securities laws ignores the fact that the 1974 amendments to the CEA were intended to be a complete overhaul and were effected with vivid Congressional awareness of the decisions implying private causes of action under the CEA as well as the related subject of the laws administered by the SEC.

18 Congress was, however, apparently aware of the pendency of at least one of these cases. See note 30 *infra*.

indicative of the uncontradicted view of the la prevailing when Congress acted. In *Case & Co., Inc.* *Board of Trade*, 523 F.2d 355 (7 Cir. 1975)(Cumming Stevens, and Tone, JJ.), plaintiff sued the Board and it governors for violating §§ 5a(1) and 5a(8) of the CEA i suspending trading limits on soybean futures. The cou began its discussion of liability by stating that "[i]t i undisputed that a private cause of action may b maintained under the Commodity Exchange Act. Se *Deaktor* . . . ." *Id.* at 360. In *Hirk v. Agri-Researc Council, Inc.*, 561 F.2d 96, 103 n.8 (7 Cir. 1977), th same court flatly stated that "[p]rivate damage action are allowable under the CEA. See, e.g., *Deaktor* . . . . See also *Bartley v. P.G. Commodities Associates, Inc* CCH Com. Fut. L. Rep. ¶ 20,123 [1975-77 Transfe Binder] (S.D.N.Y. 1975) (churning complaint unde § 4b).

We see no need to burden this opinion with detaile examination of district court decisions concernin whether the 1974 amendments eliminated the privat cause of action theretofore unanimously recognized The courts have divided although the weight o authority is in favor of continued implication.[19] A noted, the only court of appeals to have considered th issue has held that a private cause of action should b implied. *Curran v. Merrill Lynch*, note 1 *supra*.

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19 Cases finding an implied cause of action: *Milani* v. *ContiCommo ity Serv., Inc.*, 462 F.Supp. 405 (N.D. Cal. 1976); *Shearson Hayde Stone* v. *Lumber Merchants, Inc.*, 423 F.Supp. 559 (S.D. Fla. 1976 *Bache Halsey Stuart, Inc.* v. *French*, 425 F.Supp. 1231 (D.D. 1977); *Kelley* v. *Carr*, 442 F.Supp. 346 (W.D. Mich. 1977), rev'd o other grounds, Nos. 78-1091, 1092, 5542, 5460 (6 Cir., May 1 1980); *Hofmayer* v. *Dean Witter & Co.*, 459 F.Supp. 733 (N.D. Ca 1978); *Berenson* v. *Madda Trading Co.*, CCH Comm. Fut. L. Re ¶ 20,689 (D.D.C. 1978); *Gravois* v. *Fairchild, Arabatzis & Smit Inc.*, CCH Comm. Fut. L. Rep. ¶ 20,706 (E.D. La. 1978); *Rivers*

V. THE CONTINUED EXISTENCE OF TH PRIVATE CAUSE OF ACTION

In deciding the issue here before us, we follo analysis set forth in *Cort* v. *Ash*, 422 U.S. 6 (1975).[20]

Rosenthal & Co., Civ. Action File No. CV 178-186 (S.D. Ga appeal pending, 79-1313 (5 Cir.); *Poplar Grove Planti Refining Co., Inc.* v. *Bache Halsey Stuart Inc.*, 465 F.Su (N.D. La. 1979); *Jones* v. *B. C. Christopher & Co.*, 466 F.Su (D. Kansas 1979); *R. J. Hereley & Son* v. *Stotler & Co.*, 466 345 (N.D. Ill. 1979); *Aiken* v. *Lerner*, Civ. Action No. (D.N.J. 1980); *Navigator Group Funds* v. *Shearson Hayde Inc.*, 77 Civ. 5350 (S.D.N.Y. 1980) (Broderick, J.); *Gra Conticommodity Services, Inc.*, 48 L.W. 2807 (D.D.C., M 1980); *Witzel* v. *Chartered Systems Corporation of New Yo* 48 L.W. 2823 (D. Minn., May 27, 1980).

To the contrary, in addition to Judge MacMahon's opinion case, 470 F.Supp. 1256, see *Arkoosh* v. *Dean Witter &* F.Supp. 535 (D. Neb. 1976), aff'd on other grounds, 571 F.2 Cir. 1978); *Consolo* v. *Hornblower & Weeks-Hemphill, Noy* 436 F.Supp. 447 (N.D. Ohio 1976); *Bartels* v. *Inter Commodities Corp.*, 435 F.Supp. 865 (D. Conn. 1977); *Be Bache Halsey Stuart, Shields, Inc.*, 467 F.Supp. 311 (S. 1979); *Alkan* v. *Rosenthal & Co.*, CCH Comm. Fut. L. Rep. (S.D. Ohio 1979); *Liang* v. *Hunt*, 477 F.Supp. 891 (N.D. Il *Fischer* v. *Rosenthal & Co.*, 481 F.Supp. 53 (N.D. Tex. 197 v. *Saxon and Windsor Group, Ltd.*, CCH Comm. Fut. ¶ 31,100 (N.D. Ill. 1980). The three decisions from district Ohio which declined to find an implied cause of action, *Berman*, and *Alkan*, are no longer good law in that circuit in the Sixth Circuit's contrary decision in *Curran* v. *Merril* cited in note 1 *supra*.

20 This is:

> In determining whether a private remedy is implicit in not expressly providing one, several factors are relevant. the plaintiff "one of the class for whose *especial* ben statute was enacted," *Texas & Pacific R. Co.* v. *Rigsby*, 33, 39, 60 L. Ed. 874, 36 S. Ct. 482 (1916) (emphasis su that is, does the statute create a federal right in favo plaintiff? Second, is there any indication of legislativ explicit or implicit, either to create such a remedy or to d See, e.g., *National Railroad Passenger Corp.* v. *National*

There is, however, one differentiating factor
transcendent importance as to demand mentio
outset. As shown in Part IV of this opi
decisions prior to the 1974 amendments had u
upheld the existence of a private cause of acti
the provisions of the Commodity Exchange Ac
will be shown in this part, the 1974 Congress
aware of the existing state of the law. Even
more, the question thus would not be whether
intended to create a new private right of a
1974, but rather whether it intended *sub si*
alter the significance that had long been giv
provisions by making other changes in the Act
this, however, we do not need to *assume*, as t
stated would be "appropriate" in upholding a
cause of action in *Cannon* v. *University of Chic*
U.S. 677, 696-97 (1979), "that our elected re
tives, like other citizens, know the law" or to "
that they "were aware of the prior interpretat

Railroad Passengers, 414 U.S. 453, 458, 460, 38 L.
94 S. Ct. 690 (1974) (*Amtrak*), *supra*; *Securiti*
Protection Corp. v. *Barbour*, 421 U.S. 412, 423, 44 L.
95 S. Ct. 1733 (1975); *Calhoon* v. *Harvey*, 379 U.S.
Ed. 2d 190, 85 S. Ct. 292 (1964). And finally, is t
action one traditionally relegated to state law, in an a
the concern of the States, so that it would be inap
infer a cause of action based solely on federal law? Se
v. *Wheeler*, 373 U.S. 647, 652, 10 L. Ed. 2d 605, 83
(1963); cf. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 43
2d 423, 84 S. Ct. 1555 (1964); *Bivens* v. *Six Unkno*
Narcotics Agents, 403 U.S. 388, 394-395, 29 L. Ed. 2
Ct. 1999 (1971); *id.* at 400, 29 L. Ed. 2d 619, 91
(Harlan, J., concurring in judgment).

We read this in light of the later *caveat* in *Touche Ro*
Redington, 442 U.S. 560, 575 (1979) that the basic inqui
to plumb the intent of Congress, that the *Cort* factors
inquiries helpful in that endeavor, and that satisfactio
more of the *Cort* factors will not alone carry the day.

related statute. See *Lorillard* v. *Pons*, 580 (1978) ("Congress is presumed to b administrative or judicial interpretation Here the existence of an implied right o the Commodity Exchange Act as it stoo repeatedly called to the attention of approved by Congress. This alone suffic appellees' claim that if the 1974 Congr create a private cause of action, it wou have said so and that it is implausible t "Congress absentmindedly forgot to m tended private action." *Cannon, supra*, 4 (Powell, J., dissenting). Whether rightly light of recent Supreme Court jurisprude had read a private cause of action into t as they had done with statutes of sim related fields, and Congress knew that so. The burden thus lies on those who 1974 amendments demonstrate an inten prior law, or, paraphrasing the langu Justice Powell's *Cannon* dissent, *supra*, t the changes that it did, Congress "a forgot" to repeal the private cause of acti of the 1974 Congress with respect to pr action for violations of the CEA, on wh leans so heavily, is no more significant t silence of the 1975 Congress whic amended the Securities Exchange Act, When a principle has become settled decisions, there is no occasion for Con unless it wishes a change.[21]

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21 We find little force in the dissent's reliance, p 11, on the failure of the 1968 Congress to enac introduced by Representative Fino providing a

1. Taking the first of the *Cort* facto
difficulty in concluding, despite appellee
contrary, that the plaintiffs were amon
whose especial benefit the statute w
phrase going back to *Texas & Pacific R*
supra, 241 U.S. at 39. Although Congre
tees and sponsors of the ill-fated 1
devoted most of their eloquence to inju
producers at the hands of wicked s
Senate Report on the 1922 Act recogn

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action against exchanges. Quite apart from th
relying on actions of an earlier Congress, an
failure to act, see p. 59 *infra*, the question of a p
was simply not considered by Congress in th
process. The bill that became the 1968 amend
never contained a private remedy provision,
never mentioned in either congressional rep
discussed in congressional debate. The dissent's
carefully comparing the bills and deliberatel
rejecting the provision in Rep. Fino's bill
gossamer. Since the failure to act on the provisi
the slightest significance with respect to congre
time, its bearing on the effort to discern con
years later, in 1974, is infinitesimally small.

Beyond all this, when Rep Fino introduced his
right of action provision, he included with h
newspaper articles about the commodities inc
discussed the Great Salad Oil Swindle, and not
for the receiver of Ira Haupt & Co., a broker
under in that affair, "are trying to determine
justifiably file suit against the exchange for fai
Haupt eventually did, and the court recognized
action against the exchange, see *Seligson* v.
Exchange, *supra*, 378 F.Supp. 1076. If Con
consideration to Rep. Fino's bill, it could well ha
explicit remedy provision because it considered
light of the then judicial climate, as had turned
Ira Haupt & Co. before the 1974 amendments
17 *supra*. This further illustrates that attempti
to the failure of Congress, and even more so of
to enact legislation is a speculative enterprise

> Transactions in grain futur
> public for speculation and
> the purpose of eliminating
> practicable, the hazards in
> grain and its products and b
> fluctuations. Public speculat
> risk for the producers, dea
> wish to hedge their cash gra
> No. 871, 67th Cong., 2d Se

It is true that much of the deb
House consisted of vituperati
"gambling" in the grain trade t
producers and the consumer. H
were generally directed at *big* sp
a position to manipulate the n
always the recognition that "
acceptable and indeed beneficia
producers in § 3, the statement
Act, was due to a desire to stat
then existing notions of the c
than to risk invalidation by incl
Supreme Court might not thi
Wickard v. *Filburn*, 317 U.S.
twenty years in the future.[23] A

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22 See, e.g., 62 Cong. Rec. 9404 (
Chairman Tincher of the House Com
never said that the sale of wheat for f
out . . . but have always said, and
gamblers manipulate the grain mark
consumer but unfair to the legitimate
of Rep. Voight, a member of the Co
reported out the bill) ("The bill will r
stop it altogether without hurting b

23 The Court in *Hill* v. *Wallace*, su
imposed by the 1921 Act applied to

the importance of the specula
functioning of the futures marke
fully recognized by Congress as

It is plain in any event that by
amendments, as was later to be
Report on the 1978 amendme
protected under federal commodi
to include speculators." H. R. R
Cong., 2d Sess. 84 (1978). As
House Report, "The fundame
measure is to insure fair practice
the commodity exchanges and to
control over those forms of spec
too often demoralize the mark
producers and consumers and
selves." H. R. Rep. No. 421, 74
(1935). "Fair practice and hon
course, beneficial not only to
legitimate speculators using the
expressed in the last clause of t
injury to "the exchanges themsel
passed protection for those usin
was made clear in a later passage

Board of Trade in Chicago. "Looked
any limitation of the application of th
or to that which Congress may deem,
an obstruction to interstate commerce
the Act. 259 U.S. at 68. Congress
focusing on the interstate aspects of
Rec. 9404 (June 26, 1922) (Remarks
House Committee on Agriculture)
commerce, using the language of the
grains and this law will not apply
interstate transactions as defined by t
15, 1922) (The Court "called attention
interstate commerce we could reach
this bill is strictly following the d
Court . . .").

"[The bill] simply provides
what are important publi
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whether they belong to th
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While the debates in Con
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there was a recognitio
speculators, and the focus
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detrimental not only to
also to those referred to
dealers.[24] The clearest in

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24 Representative Jones, Ch
Agriculture, stated that the
on the Chicago Board of Tr
for the constant fluctuation
10446 (June 4, 1934). He l
was "to check manipulation
rig the market to the detrim
all others engaged in leg
commodities." 79 Cong.
Representative considered
speculators who deal in large
4, 1935) (Remarks of Rep. G
activities of "15 or 20 big gr
injure but will beneficially
(Remarks of Rep. Sabath).
effect. The bill was designed
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some detail. See 80 Cong.
Sen. Pope). Senator Pope
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> it is the small traders—th
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> but who furnish the real

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Rep. No. 743, 90th Con
No. 947, 90th Cong., 2
U.S. Code Cong. & Ad
House Report noted t
carried with it "the dan
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743, *supra*, at 2, but als
of the legitimate specul
provides a means of re
handling the actual com
higher prices to proc
consumers." *Id.*

Finally, and most imp
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Report noted the large
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supra, at 39. The benef
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House Report, in the la
opinion, *id.* at 138, but a

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236, 247-48 (19(
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compel arbitration, the parties having agreed that an implied cause of action existed under the Act, Judge Gurfein wrote that "[w]e have no doubt that the Act itself, *enacted as it was for the protection of investors*, prohibited a surrender of private remedies through an agreement to arbitrate which was not voluntary in the sense that the penalty for refusal was exclusion from the market." *Id.* at 1179 (emphasis supplied).[26] See also *Silverman* v. *CFTC*, 562 F.2d 432, 438 (7 Cir. 1977) ("We must be mindful of a Congressional purpose, clearly evidenced at least since 1933, to protect the American investing and speculating public not only from fraud and fraudulent practices, but from those whose past actions indicate that they might be tempted to engage in such practices") (quoting Moore, J., in *Savage* v. *CFTC*, 548 F.2d 192, 197 (7 Cir. 1977)).[27]

2. We turn now to the second and evidently the most important, see *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575, of the *Cort* factors, "is there any indication of legislative intent, explicit or implicit, either to create such a [private] remedy or to deny one?" 422 U.S. at 78. This inquiry requires an intensive examination of the legislative history of the 1974

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26 While the dissent chooses to characterize this as a "passing reference", it shows the clear understanding of the writer that the Act was enacted to protect speculators and not merely hedgers.

27 The only discordant note on the point that the CEA was intended to protect "speculators" appears to be *Liang* v. *Hunt*, 477 F.Supp. 891 (N.D. Ill. 1979), a distinct minority view from which the dissent liberally quotes. The commentators have joined the courts' nearly unanimous chorus on this point. See Bromberg & Lowenfels, *supra*, § 462(1) (concluding that "the commodity laws' lack of emphasis on investors is only apparent, not real"); Note, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. Rev. 804, 826 (1975) ("the statute's clear purpose—to increase existing protection of commodity futures investors").

amendments. We conduct this, of course, with full awareness of the cautions in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976) and *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 31-32 (1977), against the dangers of undue reliance on "passing references" by others than the Congressional committees or sponsors or on general statements not directly relevant to the issue at hand.

In our view the legislative history amply demonstrates the 1974 Congress' awareness of the uniform judicial recognition of private rights of action under the Commodity Exchange Act and a desire to preserve them. We are not, as the dissent suggests, "presuming" that Congress was aware of these decisions; the evidence of its awareness is overwhelming.

We begin with the House Report. This noted that when exchange self-regulation first developed, "[V]ery little thought was probably given to whether the failure to meet [stated] ideals would expose the exchanges to legal liability . . . ." H. R. Rep. No. 93-975, *supra*, at 45. The report stated that this view began to change early in the 1920's. "Perhaps the adoption of federal regulatory legislation spurred this total reorientation of the relationship between exchanges and the public. Slowly, the courts began to look upon exchange regulation as a guarantee to the public that its members would not violate its code of conduct." *Id*. In 1968, the report continued, amendments to the CEA required exchanges to enforce their rules, § 5a(8). The existence of private rights of action was thought to have had a perverse effect on the effectiveness of this legislation which the report explicitly noted:

> In the few years this provision has been in the present Commodity Exchange Act, there is grow-

> ing evidence to indicate that, as opposed to strengthening the self-regulatory concept in present law, such a provision, coupled with only limited federal authority to require the exchanges to make and issue rules appropriate to enforcement of the Act—may have actually have worked to weaken it. With inadequate enforcement personnel the Committee was informed that attorneys to several boards of trade have been advising the boards to *reduce*—not expand exchange regulations designed to insure fair trading, since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants. (emphasis in original).

Later in the Report the Committee noted that one of the specific problems "brought to [its] attention" was the:

> Growing difficulties facing exchanges in self-regulatory actions as a result of *private plaintiffs seeking damages* against the markets. As examples, *exchanges are sued* for actions taken in emergency situations even when the action has been taken at the request (or order) of the CEA. *Id.* at 48 (emphasis supplied).

Nothing in the report, however, indicated dissatisfaction with the private right of action; the objective was to deal with the attendant reduction in exchange rulemaking. This was to be accomplished by empowering the CFTC to require exchanges to adopt rules, § 8a(7).[28]

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28 The House Report also contained a letter from the Department of Justice to Chairman Poage of the House Committee on Agriculture

The existence of an implied private right of a was also clearly revealed to Congress in the deba what became the 1974 amendments. Introducin bill, Chairman Poage used the language quoted a which eventually appeared in the House Report, the change in the legal posture of exchange regulation. He then remarked that "when the Com ity Exchange Act was enacted, courts implied a pr remedy for individual litigants in the Comm Exchange Act." 119 Cong. Rec. 41333 (Dec. 1973).[28a] He went on to note, as would the H report, that as "the judgment of the board of dire of many of the exchanges in implementing deci under self-regulatory functions is becoming increas a justiciable issue," attorneys were advising excha to prune out rules they might not be able to enfor order to avoid the threat of liability in private act This threat was described as providing the excha with a "solid reason" for retrenching on self-regul efforts. *Id.* At the outset of consideration by the

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wherein the Department representative twice cited to the Supreme Court decision in *Deaktor*, *supra*, 414 U.S. 113. The concerned the interrelation between exchange rules and an law, and the author, discussing the doctrine of primary jurisd referred to "situations where the challenged activity is *alle violate the Commodity Exchange Act* as well as antitrust law R. Rep. No. 93-975, *supra*, at 26 (emphasis supplied). *Deakt* cited as a case, obviously brought by a private plaintiff, alleged violations of the CEA. Any legislator who read this thus have been aware that private individuals could sue exc for violations of the CEA; they had done so in *Deaktor*, a Supreme Court had merely required an initial resort regulatory agency for its views where these would be useful

28a The dissent chooses to make a point, footnote 16, that Ch Poage was in error since the first decision implying a private r action under the CEA was made in 1967 rather than 1966. to see the significance of this.

House, then, the legislators were informed
Chairman of the Committee considering the bi
private rights of action were implied under the
This was not a mere passing reference, but a
statement of fact that was a necessary s
explaining why new legislation was needed. Th
amendments signaled a dramatic shift from the
of exchange self-regulation to authorization
CFTC to compel the exchanges to alter or adopt
§ 8a(7), and the proponents of the amendments
pains to explain the need for such a shift
explanation centered on the existence of an i
private right of action. Amendments were requi
force exchanges to adopt beneficial rules becau
threat of the judicially implied private right of
had led them to shirk this responsibility. Co
could not have understood why it was changi
underlying theory from exchange self-regulati
compulsory regulation without recognizing th
private rights of action that had been judicially i
under the Act demanded this change. It opted t
the problem that had developed not by abolishi
private right of action but by empowering the C
require the exchanges to adopt appropriate rul
amount of labored parsing can obscure the self-e
truth that Congress knew the courts were im
private rights of action and did nothing to alter

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29 The point was repeated later by Representative Thone, a
of the Committee on Agriculture. See 120 Cong. Rec. 1074
11, 1974) ("Some observers believe that the provision of t
amendments requiring exchanges to enforce their own rules,
implicitly giving private parties the right to sue for nonenfor
has had a perverse effect. To avoid risk of litigation, e
authorities have been encouraged to reduce rather than str
rules designed to insure fair trading").

matters little whether this be called r
approval.

The House hearings are replete with ref
maintenance of private causes of action u
A representative of various New Yor
exchanges informed the House Committe
ture that the Chicago Board of Trade wa
moment the target of a $200 million clas
urged Congress to "take steps to insure
regulated exchanges are not exposed to
astronomical civil liability suits . . .",
Review of Commodity Exchange Act and
Possible Changes Before the House C
Agriculture, 93d Cong., 1st Sess. 121 (197
which Congress did not do. Another ex
sentative and FCM, discussing the arbi
dures to be required of contract mark
House Committee that "In addition to the
procedures, complainants *of course* have
courts." *Hearings on H. R. 11955 Befo*
Committee on Agriculture, 93d Cong.,
(1974) (emphasis supplied). A letter sent
of the just-cited hearings from Continen
indicates that the cases cited in Part IV o
may well have been only the tip of the
cases where the private cause of action w
and was sustained in a published opinio
calls to the Committee's attention "one
action settlement proceeding in court" w
the mailing of 339,000 legal notices an
legal fee claims of over $2,250,000. *Id.*

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30 The reference was apparently to *Case & Co.,*
Trade, supra, 523 F.2d 355, see p. 31 *supra*.

letter advocated requiring complainai
between arbitration or settlement proced
to courts "which have already held they
tion over private complaints based on vi
present law." *Id.*

The existence of a private right of a
repeatedly indicated during the Senate h
four bills to amend the CEA. *Hearings*
2578, S. 2837, and H. R. 13113 Befo
Committee on Agriculture and Forestry,
Sess. (1974). Senator Clark and a coi
expert, Professor Schotland of Georgeto
expressed the view that private actions
under the Act, *id.* at 205, 737, 746. A re
the Minneapolis Grain Exchange obj
settlement procedure contemplated
markets because the claims which excha
required to adjudicate were not limited
amount and wished these to be confined
the smallness of the claim entailed
impediment to Court litigation." *Id.* at 41
appeared in the bill as enacted, § 5
President of the Kansas City Board of T
Senators to protect exchanges "from un
costly defenses of lawsuits" brought und
at 317. He had made the same requ
House, with similar lack of success. *Hea*
11955, supra, at 123.[31] We shall have mo

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31 The dissent relies heavily on a chart introduced
Hearings, reproduced at footnote 14, to support
Congress did not preserve the previously recogni
action in 1974. The chart was not prepared by Co
Senate Committee, or even a single legislator,
committee staff. There is no suggestion that in p
the staff went beyond the explicit provisions of t

Congress' awareness of the privat
its desire to preserve it when w
provision preserving the jurisdi
However, what we have develope
alone sufficient to invoke "the we
construction that the reenactmer
porates preceding judicial in
Vranken v. *Helvering*, 115 F.2d 7
(L. Hand, J.), *cert. denied*, 313
canon which, as shown by the *Va*
limited to interpretations by the
Electric Storage Battery Co. v. *S*
14 (1930); *Lorillard* v. *Pons*, 4
(1978); *Bennett* v. *Panama Canal*
1282 (D.C. Cir. 1973) (Wyzans
irrebuttable presumption which f
ment with knowledge [of the Fift
tion of "may" as permissive]"). Th
particular force to the instant c
amendments constituted "the first
the Commodity Exchange Act sinc
Rep. No. 93-975, *supra*, at 1, the
provisions were left unchanged, a
made acutely aware of the prior
that these provisions gave rise
action.[32]

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does not purport to deal with the b
"damages", but only with the subject
the chart had attempted to deal with th
it could have reached only one conclusi
implied private right of action, since th
the courts prior to the 1974 amendm

32 The dissent argues that none of t
exception of *Deaktor*, was expressly c

The Supreme Court has app
numerous occasions. In *Lorillard*
(1978), Justice Marshall, writ
Court, said that when Congre
statute incorporating sections of
statute, "Congress is presumec
administrative or judicial inter
and to adopt that interpretatio
statute without change"—even
above, the interpretations were
and not by the Supreme Cou
significant that the judicial const
statute had been unanimous, *id.*
judicial implication of private ri
1974 in our case. In *Georgia* v. *U*
526, 532-33 (1973), the Court v
question concerning interpretatio
Act, enacted in 1965 and exte
deliberations" in 1970, with cha
areas other than the section b
Court had reached a decision on
the 1969 case of *Allen* v. *State E*

Congress' failure to mention *Deaktor*
We fail to see why. As we have dev
evidence that Congress was well aw
consistently implied private rights of
fact was brought out in the House Rep
hearings before both houses, and was
specific aspects of the bill. In light of
specific case names or citations were n
this was simply because no one parti
pre-1974 case confronting the question
action without limitation in the opinio
at issue—a result foreordained by the
securities laws—and *Deaktor*, which i
owed by *Baird* v. *Franklin*, *supra*, 1
thirty years before, thus was not a n

U.S. 544 (1969). Justice
Congress disagreed with
Allen, it had ample oppor
After extensive deliberatic
the Voting Rights Act, du
repeatedly discussed, the
years, without any subst
411 U.S. at 533. A footno
that the "repeated discus
hearings. *Id.* n.5. While we
decision of the stature of
since the Court's opinion i
not an express holding o
cause of action under the
cases, including the Seve
review in *Deaktor*, reache
implication, and decisions
action were called to the a
in Congressional hearing
States but in the House

The presumption just
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changes made in the CEA
up in detail, we note cert
to those already discussed
strong showing of an int
cause of action for fraud,
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order to justify a conclu
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1974 amendments was d
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the regulation of futures
93d Cong., 2d Sess. 1 (1
original hearings in the H
the Committee on Agri
strengthening and revisin
No. 93-975, *supra*, at 53
of the House by the C
ranking minority membe
Cong. Rec. 10736 (April
Poage) ("to strengthen
trading); *id.* at 10739 (R
inform and strengthen
Senate was the same. S
supra at 18 (section en
Extended Regulation").
Lynch, supra, note 1 at
the CFTC Act . . . indic
extend further protectio
rather than to extinguish
Yet the appellees would
course of ascribing to C
to private sanctions com
legislative purpose. See
Association v. *Federal*
672, 690 (D.C. Cir. 197
(1974) (Wright, J.) ("w
susceptible of more tha
only consult its langua
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generally Cox, *Judge Lea*
tion of Statutes, 60 Har

In support of th
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33 These are FCM
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34 See *Hearings*
Discussion of Po
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House Committee
2485, S. 2578,
Committee on Ag

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Corp. v. *I*
(Amtrak), 41
v. *Redingto*
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> right of final determination by the courts are expressly preserved. 120 Cong. Rec. 30459 (Sept. 9, 1974).

The first sentence strongly suggests that Congress did not intend to repeal private rights of action by enacting the reparations procedure, and the second sentence is not to the contrary. If the reparations procedure was intended to be exclusive, then it *certainly* would lighten the burden on the courts, even with review of reparations orders by the courts of appeals. But the Senator spoke in terms of "hope" and lightening the burden "somewhat"—as if reparations were an alternative he hoped had been made attractive enough to sway some aggrieved traders away from the courts. The second clause relating to judicial review simply noted that even for those who elected reparations there could still be court involvement. Again the House Report describes the reparations procedures as "intended as a separate remedy designed to supplement the informal 'settlement' procedures contemplated of the contract markets and registered futures associations which are required under other sections of the legislation . . . ." H. R. Rep. No. 93-975, *supra*, at 22. These last two types of settlement procedures, however, are expressly made voluntary by the Act. See §§ 5a(11), 17(b)(10). It can therefore be inferred that the reparations remedy is of the same character, and that the aggrieved trader is in no sense compelled to resort to reparations to obtain relief. Commentators have relied on this reasoning, and the savings clause in § 2(a)(1), in concluding that "the victim of a CEA violation is free to ignore the reparations procedure and file a lawsuit." Bromberg & Lowenfels, *supra*, § 461 at 82.362 (1979). The CFTC is

of the same view. See 41 F.R. 3994 (Jan. 27, 1976); *id.* at 18472 n.5 (May 4, 1976).[35]

The argument that the reparations procedure was intended to be the exclusive private remedy is further

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35 The dissent argues, despite all these contrary indications, that the reparations procedure was designed to be the exclusive private remedy beyond informal settlement. In support of this it quotes a letter from Earl Butz, Secretary of Agriculture, published in the House Report, which states that the reparations procedure "should make possible full and equal justice for those who feel that they have been in some way damaged in the handling of their commodity accounts." The dissent underscores this language, although it is not at all clear what about it suggests that reparations were intended to preclude private actions rather than constitute an additional remedy for aggrieved persons to whom the burden of litigation might be prohibitive. In any event it is irrelevant to our case. The plaintiffs seeking relief before us are not complaining about the handling of their accounts but rather of broad market manipulation. The dissent further stresses a passage from the House Report where it is stated that the Commission "will have original jurisdiction to consider all such complaints" which have not been resolved informally. Again, nothing in this suggests that Commission jurisdiction of reparations proceedings was meant to preclude the jurisdiction of the courts which had been widely recognized. The dissent also relies on the ceiling for civil penalties against exchanges in § 6b of $100,000, arguing that allowing private recovery for "unlimited" damages would be inconsistent with this ceiling. Penalties and damages, however, are quite different in nature. The former are punitive and some limit on the regulator's discretion to impose them is necessary. The latter are remedial and naturally limited to the loss caused by the defendant. Further, the dissent's argument proves too much. There is a limit of $100,000 on the fines which can be imposed on a FCM under § 6(b), but the FCM's are subject to "unlimited" private recovery in reparations. Congress obviously saw no inconsistency between allowing recovery for actual damages and limiting fines. Finally the dissent states that under § 6b fines against exchanges are limited to "an amount which will not 'materially impair the contract markets' ability to carry on its operations and duties.'" P. 47. Rather the CFTC is required to *consider* whether a fine will have this effect; the only ceiling in § 6b is the $100,000 maximum, which, incidentally, is not an "overall" limitation as the dissent states but rather a limit per violation. (For example, each day of failure to comply with a cease and desist order is a separate violation, § 6b). Concern for an FCM's ability to carry on business is specifically required to be considered in § 6(d), yet FCM's are subject to full damages in reparations.

negated and the case for the continuance of the privat cause of action is enhanced by the jurisdictional saving clause, § 2(a)(1).[36]

As passed by the House, the exclusive jurisdictio provision read as follows:

> *Provided,* that the Commission shall have exclusiv jurisdiction of transactions dealing in, resulting ir or relating to future delivery . . . *And provide further,* that nothing herein contained shall su persede or limit the jurisdiction at any tim conferred on the Securities Exchange Commissio or other regulatory authorities under the laws o the United States . . . .

The purpose of this was to separate the functions of th new CFTC from those of the SEC and other regulators As explained in the House Report, "All commoditie trading in futures will be brought within federa regulation under the aegis of the new Commissior however, provision is made for preservation of Secur ties Exchange Commission jurisdiction in those area traditionally regulated by it." H. R. Rep. No. 93-97 *supra,* at 3. See generally Johnson, *The Commodit Futures Trading Commission Act: Preemption as Publi Policy,* 29 Vand. L. Rev. 1 (1976); Russo & Lyon, *Th Exclusive Jurisdiction of the Commodity Future Trading Commission,* 6 Hofstra L. Rev. 57 (1977). Th provision was not intended to limit the jurisdiction o

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36 Plaintiffs do not seek to base their right of action on th jurisdictional provision, but rather point to it as evidencing congressional concern to preserve existing rights of action. Appellee criticism, derived from *Touche Ross & Co.* v. *Redington, supra,* 44 U.S. at 577, that plaintiffs' rights must be found in substantive an not jurisdictional provisions, is therefore inapt.

the courts. See *Jones* v. *B. C. Christopher & Co.*
466 F.Supp. at 218-19.

However, there was fear that it would do
numerous objections were raised to the House p
in the Senate hearings. Admittedly some of the
not primarily concerned with the question o
jurisdiction to hear claims in private actions ur
CEA. Chairman Rodino of the House Committe
Judiciary was concerned that the House p
might be read as pre-empting state courts
jurisdiction to enforce futures contracts under
commercial law and "to oust even federal co
jurisdiction". Testifying before the Senate Con
he suggested an amendment "to define the juris
including antitrust jurisdiction, of federal cou
commodity transactions." *Hearings on S. 2485,*
S. 2837 and H. R. 13113 Before the Senate Co
on Agriculture and Forestry, supra, at 259-60
Chairman Rodino's remarks were focused on a
jurisdiction, they were not limited to that. He
generally that federal courts retained jurisdicti
cited antitrust jurisdiction as an example sup
this view. Other objections to the exclusive juri
provision of the House bill were explicitly addr
the preservation of private rights of action.[37]
Clark noted that treble damages actions, prov
bills which he and Senator McGovern had intr

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37 See also testimony of Deputy Assistant Attorney
Clearwater of the Antitrust Division, *id.* at 663, to which
Talmadge responded: "I have read your statement in its ent
I doubt that this committee, and I doubt the House hac
depriving either Federal courts or [sic] jurisdiction in
matters, *or any other matter,* and certainly not State cour
664 (emphasis supplied).

were often the most effective enforcemen
"Unfortunately, the House bill not only
authorize them but section 201 of that bill ma
all court actions. The staff of the House A
Committee has said that this was done inad
and they hope it can be corrected in the Sena
205. Professor Schotland did not refer direct
exclusive jurisdiction provision, but urged ra
the reparations provision, if retained at all,
accompanied by "explicit language in the sta
Federal and State courts are still open if a co
prefers to go to trial there." *Id.* at 737, 747

The upshot of these various objections
addition by the Senate of the "savings clause
§ 2(a)(1):

> nothing in this section shall supersede or
> jurisdiction conferred on courts of th
> States or of any State. S. Rep. No. 93-11
> at 54.

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38 Defendants and the dissent suggest that the failure to
bills is evidence of legislative intent to repeal the priv
action. This suggestion is unpersuasive. None of the bill
simple private right of action for actual damages. Rathe
proposals, H. R. 11195 and S. 2378, would have ex
previously judicially recognized right of action by p
treble damages for any violation; and one bill, S. 283
treble damages for a willful violation and actual d
nonwillful violations. The dissent's argument that it woul
simple to change the bills so as to eliminate the provisi
damages ignores that trebling was what the propos
Simple damages were recoverable under existing law. V
"ignored" the discussion in the *Amtrak* case, 414 U.S. at
dissent charges, p. 45, where Congress failed to adopt an
that would have altered the interpretation which the
Transportation had placed on the proposed act. It
inapposite.

The purpose of this change was stated
clear that . . . Federal and State cou
jurisdiction." *Id.* at 6. The Conferenc
Senate amendment, with the same sta
Rep. No. 93-1194, 93d Cong., 2d Sess.
Rep. No. 93-1383, 93d Cong., 2d Sess.
respective chairmen of the House and
tees reported that "the conferees wishe
that nothing in the act would supersed
jurisdiction presently conferred on court
States or any State. This act is reme
designed to correct certain abuses w
found to exist in areas that will now c
jurisdiction of the CFTC." 120 Cong. R
10, 1974) (Senator Talmadge); 120 Co
(Oct. 9, 1974) (Representative Poage). W
this with Congress' recognition that ju
private causes of action had been held
conferred, the conclusion that Congres
continued recognition is nigh irresistibl

Appellees' primary answer to the foreg
is that the pre-1974 cases upholding a p
action under the CEA were wrongly dec
new trend in Supreme Court jurispruden
to implication and that, in consequenc
desired to preserve such a cause of acti
clause was insufficient and nothing sh
statement would do. This argument migl
impressive if we were dealing with legisl
Congress today. But the law here before
on October 23, 1974 and "the relevant
whether Congress correctly perceived th
the law, but rather what its perception c
Brown v. *G.S.A.*, 425 U.S. 820, 828-29

with approval by the majority in *Cann*
of Chicago, supra, 441 U.S. at 710-1
did the 1974 Congress perceive the st
allowing implied causes of action under
perception was correct. As already
related area of securities regulation w
J. I. Case Co. v. *Borak, supra,* 377 U.S
cited with approval, subsequent to t
ments, in *Cort* v. *Ash, supra,* 422 U.S
distinguished but in no way disappr
Barbour, 421 U.S. 412, 423-24 (197
course follow the most recent pronou
Supreme Court, those pronouncem
attention on the question of legislative
evaluation of congressional action . .
account its contemporary legal context.
441 U.S. at 698-99.

The sole decision preceding enactm
amendments to which appellees point a
new trend is the *Amtrak* case, 414 U.S
January 9, 1974. Apart from the fact t
decided when the amendments were w
enactment and there is no evide
concerned with the amendments were
decision would not in any event have
flag to Congress to make its approval c
of action explicit. The clear language of
and its legislative history manifested a
suit only by the Attorney Genera
employees, and not by others such as
passenger association. The Secretary o
had voiced this interpretation during t
as Justice Stewart reasoned, "it is sure
that the members of the Committee w

mute if they had disagreed with
sponsor of the bill in the Hou
both when introducing the bill a
that private actions *were* availab
"most unlikely" that the legis
amendments "would have sto
disagreed with it."

Finally, Justice Stewart emp
private suits would be inconsist
purpose of the Amtrak Act, sinc
concerned with paring rail pass
and without time-consuming p
This would have been reason e
private cause of action even un
432. See also *SIPC* v. *Barbour*,
(1975) (*Amtrak* viewed as case v
action was inconsistent with leg
there is little dispute that the
would be effectuated by private

In light of this it is unnecessa
far the recent triad of *Ca*
Transamerica may have gone i
cause of action. We do think, ho
about the death of the implied
have been circulating in the wak
attitude strongly reflected in th
ated, at least as far as previous
concerned, and that the effect of
to emphasize that the ultimate
sional intent and not judicial
constitute wise policy. See *Zeffir*
Banking and Trust Company
(No. 79-2259) (injured debent
implied cause of action under

against indenture trustee wh
Two of the decisions themse
actions, *Cannon* under Title IX
§ 215 of the Investment Advise
support for the result we hav
since the majority opinion rec
on implying rights of action
courts to consider Congression
legal context. Both *Redington*,
right of action under § 17(a)
Exchange Act, and *Transam*
implied action for damages u
Investment Advisers Act, co
were enacted *prior* to the gre
recognition of implied rights.
action in 1974 involved in thi
involved in *Cannon*, the congr
and 1940 under review in *Redi*
were not taken against a bac
judicial recognition of implied
for damages either as a genera
to the specific subject matter o
the legislative history on priv
both *Redington* and *Transamer*
442 U.S. at 571-72; 62 L. Ed.
the instant case. *Redington* in
provision, as to which there
implication of private causes o
"flanked by provisions" expr
right, and *Transamerica* turne
declaration that certain acts
void, which was taken to grant
not of damages, and the corre
jurisdictional clause of the In

Far from foreclosing in
action, *Transamerica* exp
provide such actions "
language or structure
circumstances of its ena

Even if we were to acc
Redington-Transamerica
if they had been rendere
to the CEA were ena
demonstrates beyond fai
and approved the un
recognizing private caus
which in turn, were s
Court's decision in *Bora*
now to be regarded as an
441 U.S. at 735-36 (Pow
supra, 442 U.S. at 576
thinking that the 1974
would be such a drastic

Appellees also argue t
issue cannot support a p
they merely proscribe
duties, rather than expli
5(d), 5a(8)). It is true th
casts a statutory provisi
of the propriety of impli
U.S. at 690 n.13; *Transa*
154, but this is by no m
here, the legislative hist
[a statute's] enactment" e
a private cause of action
is expressed cannot be p
to its realization. The ca
a linguistic test for imp

securities cases are a
dichotomy. *Cannon*, s
Even if Congress w
significance of this di
not, there would have
that the CEA would no

The same considera
criminal provision su
private cause of acti
implied a cause of actio
Deaktor, supra, 479 U
Court had implied s
provisions, see, e.g., *Bo*
for Congress in 1974
continue. In *Cort* v. *A*
of the 1974 amendmen
imply a private cause o
suing derivatively fron
corporations from ma
contributions. He was
"provision of a crimin
preclude implication o
damages," and he refu
. . . a bare criminal
sufficiently protective
give rise to a private
that group." 422 U.S.
He rested the decision
protect corporate share
a subsidiary purpose o
factors are all either
implying a private cau
the CEA we have fo
legislative history that

commodity futur
other relevant fa
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directly or on re
(civil fines for, *in*
desist orders); § 6
of residents); § 5
market designati
all a case where
implying a priv
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As previously r
the dissent also a
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another of Cong
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such a failure is
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failed to act on
reasons other th
point was already
Crystal Salt Co.
(1 Cir. 1969);
Employment Sec
(Iowa 1949); ob
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just plain loss in
United States v.

283 (1947), with
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apt—"the fact t
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39 We find little
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the Commodity Exchange Act, 27 Emory L. J. 1057 (1978); Young, *A Test of Federal Sunset: Congressional Reauthorization of the CFTC*, 27 Emory L. J. 853 (1978). Some had, see, e.g., *Kelley* v. *Carr*, *supra*, 442 F.Supp. 346 (W.D. Mich. 1977), but others were hamstrung by perceived limitations in the *parens patriae* doctrine. H. R. Rep. No. 95-1181, *supra*, at 14. The addition of § 6d was designed to remove these doubts and to enlist the prosecutorial and enforcement tools of the states to aid the CFTC in correcting abuses primarily off the contract markets. See *id.* at 15 (§ 6d "is intended, among other things, to provide the several states with the power . . . to protect their citizens from persons, such as London options firms, vendors of dealer options and merchants of so-called leverage contracts who perpetuate fraudulent and other practices made unlawful by the Federal law"). See also *Luna* v. *Merrill Lynch*, *supra*, note 1 at 6-8 n.24. Since this concern was largely with off-market abuses, contract markets, clearinghouses, and floor brokers were exempted from the coverage of § 6d. See S. Rep. No. 95-850, 95th Cong., 2d Sess. 25-26 (1978) (activities of these persons "generally of the character of 'pit trading' rather than customer contact"); 124 Cong. Rec. S10561 (July 12, 1978) (Remarks of Sen. Bellmon).

Indeed, the legislative history indicates that the perceived existence of an implied private cause of action against exchanges was actually one of the reasons for their exemption from § 6d. Explaining the exemption, Senator Leahy of the responsible committee noted that:

> The exemption from State suits provided to contract markets is justified due to the deterrent effect on contract markets caused by Commission

> regulation, institution of Commission enforcemen proceedings, and *the implied private rights o action that may be brought against those contrac markets that fail to discharge their duties unde the Commodity Exchange Act.* 124 Cong. Rec S16527 (Sept. 28, 1978) (emphasis supplied).

Since Congress explicitly relied on judicially implie rights of action in fashioning the exemption in § 6d that exemption can hardly be cited as evidence of desire to insulate exchanges from such actions. See als *Smith* v. *Groover, supra,* 468 F.Supp. at 117 ("We fai to see how an apparent congressional unwillingness t *extend* the liability of contract markets suggests a intention to *abolish* such liability altogether").[40]

This analysis is enough to answer NYME's majo contention, namely, that the exemption of contrac markets from the *parens patriae* actions newl authorized in 1978 is evidence that Congress did no mean them to be subject to private actions of any sort The dissent adds two broader arguments. The first i that the 1978 amendment offered Congress a

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40 Requiring states to proceed in federal court and to notify th FCTC does not demonstrate that the 1978 Congress intended t eliminate the private suit for damages which had been recognized b its predecessors four years previously. The states were expected t act largely in an enforcement role, much as did the FCTC; moreove it would be incongruous to allow a state to proceed as *parens patria* in its own courts for a violation of federal law. Sufficient means t obtain uniformity in private litigation were afforded by th controlling effect of federal law in all CEA litigation and th possibility of referral to the CFTC approved by the Supreme Cour in *Deaktor.* Beyond this the dissent's reliance on such a slender ree as the inference to be drawn from the 1978 Congress' havin required *parens patriae* suits to be brought in federal courts wit prior notice to the CFTC is a prime example of the unreliability— frequently noted by the Supreme Court—of relying on the thinkin of a later Congress as a guide to the intentions of a former one.

opportunity expressly to affirm the private right o
action in the face of a few district court decisions tha
this no longer existed in the light of the 197
legislation and what the dissent calls "the Suprem
Court's recent but well-publicized adoption of somewha
stricter principles governing the implication of privat
causes of action." There are several answers. The first i
that in 1978 Congress was concentrating on *paren*
patriae suits; it was not considering a general revisio
of the CEA. "The logic of defendants' argument woul
be to require federal courts to prohibit private action
with respect to any statute amended in any way afte
the mid-1970's if Congress did not explicitly create
private right of action." *Navigator Group Funds, supra*
at 16. The second is that while Senator Huddlesto
cited two district court decisions which had denied
private right of action under the 1974 amendments
these were regarded as "unfortunate" and contrary t
the many others he listed that had recognized th
continued existence of such actions. 124 Cong. Rec. S
10537 (July 12, 1978). Indeed the Senator expecte
additional causes of action to be recognized under othe
provisions of the CEA in the future, a view that hardl
comports with fear of a new restrictive trend i
implication jurisprudence. The third is that the asserte
new trend in Supreme Court decisions had not ye
begun, let alone been "well-publicized". *Cort,* whic
cited with approval both *Rigsby* and *Borak,* 422 U.S. a
78, merely disallowed a private cause of action in th
case *sub judice.* It did not indicate any new trend, an
the courts have not so regarded it. As Mr. Justic
Powell noted in his *Cannon* dissent of 1979, 441 U.S. a
741, "In the four years since we decided *Cort,* no les
than 20 decisions by the Courts of Appeals hav

implied private actions from federal statutes." *Chris-Craft Industries*, 430 U.S. 1 (1977), paid ful attention to *Borak*, *supra*, 377 U.S. 426, *Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 7 (1975) had also done, and to *Superintend Insurance*, *supra*, 404 U.S. 6. The issue adversely to the plaintiffs in these cases v whether an implied cause of action existed g but whether the particular plaintiffs came wit protected class. The other cases cited are even the point. The first indication of a changed that could be detected by anyone reading the opinions without an exceedingly high powered n ing glass, not possessed even by the courts of much less by the Congress, was the 1979 opi *Cannon*—and there not in the decision, whi favorable to the plaintiff, but in footnote 6 Justice Stevens' opinion, and especially in the ing opinion of Mr. Justice Powell.

The dissent argues finally that the express co of a right of action upon the states in 1978 sho Congress thought such action to be necessary any private cause of action could exist. The ass belied by the very passage from the House Repo which the dissent quotes. There was no his recognition of causes of action by the states o of their residents; indeed the very existence of *patriae* actions for other than a state's own f loss had been called into most serious ques *Hawaii* v. *Standard Oil Co. of California*, 405 U (1972). The fact that only express legislatio overcome that decision does not at all sugge Congress meant to destroy an implied cause o by victims of proscribed practices which the cou

upheld since 1967 and Congress had recog
1974.[41]

3. Our answer to the second question posed
largely determines that to the third, "is it c
with the underlying purposes of the legislativ
to imply such a remedy for the plaintiff?" Inc
question need hardly be asked in a case wher
have found here, there is abundant evide
Congress affirmatively intended the private re
continue. If Congress clearly thought the reme
consistent, it would be of no moment that
should have doubts about this. Moreover, we h
pointed to nothing that would show how mai
of suits such as these can impede the functioni
CEA. If questions should arise in which a cou
be aided by consideration by the CFTC, the p
of a stay pending Commission consideration, w
Court directed in *Deaktor, supra,* 414 U.S. a
available. The Commission sees no inconsistenc
contrary, it tells us in its *amicus* brief (p. 15

> private damage suits under the Act are c
> and may coexist with the forums
> provided by Congress for the adjudic
> complaints of futures traders—Commissio
> tion proceedings and contract market ar
> proceedings. The Commission has caref
> monized these three rights that, in its vi

41 The list of CEA protections in the 1978 Senate Repor
95-980, *supra*, at 12-13, which the dissent, note 25, sees
of a congressional belief that no private right of acti
included only those protections *expressly* provided by th
is not at all inconsistent with the view, clearly held b
Congress, that other judicially *implied* protections e
Navigator Group Funds, supra, at 14-15.

offered a commodity trader an elect
since 1974. (footnotes omitted).

The Commission also notes that it "is
limited resources which are insufficient
police all commodity-related transactio
that the private damage remedy, in
Cannon, "is necessary or at least
accomplishment of the statutory purpos
703. Such expressions by the agency ch
administration of the statute are entitle
weight. *Cannon, supra,* 441 U.S. 706-0

4. Fortunately, little space needs to be
fourth *Cort* factor, "is the cause
traditionally relegated to state law, so t
inappropriate to infer a cause of action
federal law?", 422 U.S. at 78. The answ
the negative. The federal government h
concerned with trading in futures since
the courts have held that § 2(a)(1) of the
the application of state law. See *Interna
Ltd.* v. *Bell,* 262 Ark. 244, 566 S.W.
Bromberg & Lowenfels, *supra,* at § 4.6
supra.

Having answered the first and third C
the affirmative and the fourth in the
having found as to the second that
evidence of legislative intent to pres
remedy, we conclude, in accordance
Circuit's decision in *Curran* v. *Merrill Ly
supra,* that the district court was in e
that no private cause of action in damag

of the CEA existed. Since the district the claims under the CEA, we need which claims, if any, were within provision, § 4b, as distinguished from tion provision, § 9(b), relied on as to § 4a, relied on as to the conspirators a and §§ 5(d) and 5a(8), relied on as Although the other provisions are forward and clearly cover the activiti complaint, § 4b, to put it mildly, provision to construe. Commentators that "While the intent to outlaw fraud (A)-(C) subparagraphs, the syntactic precedes them makes it difficult to an questions about coverage." Bromber *supra*, § 452, at 82.286. Appellees are that § 4b by its terms only prohibits "a defrauding "any other person" in con making of a futures contract for or o other person. Thus, if A defrauds bro making a futures contract for C, defrauded C in connection with a futur for C, although C is not A's applicability of § 4b may well exten since it could be argued that one trad account makes a contract "for" himse fraud between two principals withi language of § 4b. The legislative

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42 The plaintiffs in the consolidated actions b persons who traded through agents, who example, and persons who traded directly for *National Super Spuds, Inc.* v. *NYME*, 77 F.R. 1977). It is not clear in every case, however within which group.

provision contains some statem
intent to protect "customers", se
73d Cong., 2d Sess. 5 (1934),
suggested as the limit of cove
ments which suggest a broad c
Rep. No. 1551, 72d Cong., 1st S
Rec. 6162 (April 27, 1936) (Rem
at 7853 (May 25, 1936); H. R
Cong., 1st Sess. 3 (1967); S. Rep
2d Sess., reprinted in 2 U.S.
News 1673, 1678 (1968). Whe
section was suggested in 1974, S
as an example of archaic lan
"simply try[ing] to convey the i
for any person to cheat or def
Hearings on S. 2485, S. 2578, S.
Before the Senate Committee
Forestry, supra, at 687 (Sen. Cla
echoing the views of a predec
section when it was proposed:
legislation is, or should be, to
fraudulent transactions. Any l
plished that end is worthy of c
Rec. 7871 (May 25, 1936) (Rema
None of the cases recognizing an
under § 4b suggest limitation t
relation. Their reasoning is b
quently cite non-§ 4b cases such
Agri-Research Council, Inc., supr
court suggested that, in line w
Insurance v. *Bankers Life & Ca*
U.S. at 12, the language of § 4b
not technically and restrictively
seriously mistaken in assuming

ily be limited to cases com
language. We deem it inad
applicability of § 4b without t
the exact relations among the
plaintiffs may find it unnec
section. It is enough for presen
counts stricken from the comp
gross violation of the prohi
§ 9(b), of the very type agai
been legislating for half a cen
The order of the District Co

MANSFIELD, *Circuit Judge* (Dis

I respectfully dissent for
Commodity Exchange Act (Act)
ing to well-settled principles of
by the Supreme Court in *Cor*
(1975); *Cannon v. University o*
(1979); *Touche Ross & Co. v. R*
(1979); and *Transamerica Mor*
Lewis, 100 S. Ct. 242 (1979), f
any Congressional intent to ap
an implied private right of a
plaintiffs-appellants (1) again
merchants and brokers (such
Commodities Inc., Thompson
closs, Kohlmeyer Inc., and Clay
Louis, Inc.), or (2) against cont
the New York Mercantile Excha
the contrary, Congress express
panoply of judicial and adm
enforcing compliance with the A

compensatory reparation
orders, and criminal pena
viewed as exclusive.

None of the sections
appellants (such as §§ 4b
U.S.C. §§ 6b, 13(b), 7(d)
even remotely suggestin
the "especial" benefit o
plaintiffs are member
considered in determini
Ash, supra, 422 U.S. at
the Act, 7 U.S.C. § 6b, t
relied on by plaintiffs
against the broker defe
enacted for the benefit
plaintiffs are *not* membe
fraud against brokers w
customer relationship. S
§ 13(b), a criminal statu
reveals that it was en
general public, which
requirement that a statu
be for the benefit of a "
Act, upon which plainti
claim against the New
essentially a licensing
things, obligates contr
certain requirements, in
manipulation. It neith
members of any class,
proscribes any conduct

The legislative history
hundreds of pages of Co
debates, fails to contain

right of action, desp
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in 1974 Congress faile
enact any one of se
expressly provided a
violations of the Act,
§ 505(a) (1974) (Hart b
bill). In 1968 Congress
have made *contract ma*
for violations of the A
Sess. § 32 (1967). M
reparations procedure
violation of the Act can
§ 14, and its legislativ
"Congress knew how to
when it wished to do s
Ct. at 248 n.13, b
reparations procedure,
provided remedies, a
aggrieved by violations
93d Cong., 2d Sess. 2
Act differs sharply fro
1934, 78 U.S.C. §§ 7
majority, which does no
proceeding to recover

Faced with this pe
intent to create or appr
majority relies on the
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U.S. 412, 419
Corp. v. Nation
414 U.S. 453, 4
Realty Corp. v.
cert. denied, 3
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> *Cort*
> [Foo
> at 6

> "While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g., J.I. Case Co. v. Borak, supra,* what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. *Touche Ross & Co. v. Redington, supra,* at [568]; *Cannon v. University of Chicago, supra,* at [688]. We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us." *Transamerica, supra,* 100 S. Ct. at 245.

If the language and structure of the statute clearly demonstrate Congress' intent, we need go no further. If not, we must attempt to fathom Congress' intent by applying the factors set forth in *Cort v. Ash.* The first of these is whether the statute indicates that it was enacted for the "especial" benefit of a particular identifiable class of which the plaintiff is a member. We may not, however, infer an intent to create a private remedy merely from Congress' expressed desire to benefit the public generally or even to benefit everyone engaged in an entire industry or line of commerce. As the Court stated in *Cannon, supra,* 441 U.S. at 690:

> "The language in these statutes—which expressly identified the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in *Cort, supra,* and other laws enacted for the protection of the general public.[13]"

Footnote 13 reads in relevant part:

> "Conversely, the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large. See *Piper v. Chris-Craft Industries*, 430 U.S. 1 ('unlawful' conduct); *Cort v. Ash, supra* ('unlawful' conduct); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (duty of SIPC to 'discharge obligations'); *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453 (forbidding 'action, practice, or policy inconsistent' with the Amtrak Act); *Wheedlin v. Wheeler*, 373 U.S. 647 (setting procedure for procuring congressional subpoena); *T.I.M.E. Inc. v. United States*, 357 U.S. 464 ('duty of every common carrier . . . to establish . . . just and reasonable rates . . . .'); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (similar duty of gas pipeline companies)."

The term "especial" benefit refers to a specific, definable class, described by the Court in *Cannon* as "a special class of which the plaintiff is a member," 441 U.S. at 689. The broader that class, the weaker is any implication of intent to provide its members with a private remedy. Otherwise the "special class" would embrace everyone.

Thus, we must carefully search the language of the statutory provisions under consideration for any expression of intent to benefit a specific group, as distinguished from an intent to benefit an entire industry, line of commerce or the public at large. Absent such expression, the possibility that Congress

intended to provide a private remedy is so slim as to be virtually non-existent.

Assuming that the statute on its face evidences a desire to benefit a special class of which plaintiff is a member, we must next examine the statute as a whole and such relevant circumstances surrounding its enactment as may shed light on Congress' intent with respect to remedies. An important consideration in this search is whether and to what extent that statute expressly provides remedies other than a private right of action for its enforcement. The failure to provide any remedies is obviously not helpful to a private plaintiff, since "implying a private right on the basis of congressional silence is a hazardous enterprise, at best," *Redington, supra*, 442 U.S. at 571. But this is not dispositive, since "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make a private remedy available," *Transamerica, supra,* 100 S. Ct. at 246. On the other hand, if the statute *does* contain other provisions for its enforcement, such as judicial or administrative remedies, which would secure most if not all of the relief sought in the private action, a private remedy will not ordinarily be implied. The Court has recently reiterated the principle of statutory construction in *Kissinger v. Reporters Committee for Freedom of the Press,* 48 U.S.L.W. 4223, 4226 (March 4, 1980), and in *Transamerica, supra.*

> "Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular

> mode, it includes the negative of any other
> *Botany Mills v. United States*, 278 U.S. 2
> (1929). See *Amtrak, supra*, 414 U.S. a
> *Securities Protection Investment Corp. v. B*
> 421 U.S. 412, 419; *T.I.M.E., Inc. v. United*
> 359 U.S. 464, 471." *Transamerica, supra,*
> Ct. at 247.

It is reasonably clear that the broader the sco
type of the expressly-provided remedies, the les
need or justification for implying an unmer
additional private remedy. In such circumstanc
highly unlikely that "Congress absentmindedly
to mention an intended private action." *Transa*
supra, 100 S. Ct. at 247 (quoting *Cannon, sup*
U.S. at 742).

Next in our search for legislative intent we
the legislative history of the statute. The most
and persuasive indicia of congressional inte
course, are Senate and House Committee R
United States v. International Union (UAW-CI
U.S. 567, 585-86 (1957); *Banco Nacional de C*
Farr, 383 F.2d 166 (2d Cir. 1967), *cert. denie*
U.S. 956 (1968); *International Tel. & Tel. C*
General Tel. and Electronics Corp., 518 F.2d 91
(9th Cir. 1975); *American Airlines, Inc. v. CA*
F.2d 939, 949 (D.C. 1966).

Absent definitive statements on the issue of
remedy by those solons vested with primary re
bility for the statute, certain surrounding r
circumstances may shed light on Congress' inten
remedies, such as its consideration and/or rejec
an express private remedy, its statements of
standing as to the necessity or lack of it for

provision, whether an implied remedy is con
with the statute's underlying purposes and wi
other enforcement measures expressly provided
and whether the private remedy is one tradit
relegated to other tribunals, such as adminis
bodies or state courts. Most of these other c
stances, however, while of some relevance, usuall
but a weak reed upon which to rest a determina
Congress' intent. There comes a point where legi
history becomes so will-o'-the-wisp or far-fetche
respect to the matter in issue that we run the da
attributing to Congress thoughts it never actual
"The search for significance in the silence of Co
is too often the pursuit of a mirage," *Scripps-H
Radio v. FCC, supra,* 316 U.S. at 11. This e
process is particularly illusory, stultifying and u
tic where, as here, we may reasonably expect, h
the issue of a private damage remedy is so imp
that, had Congress approved or acquiesced in a
right of action, it would have said so somewhere
thousands of pages of legislative history on th

For these reasons, where it is claimed that Co
has created the significant and potentially deva
remedy of a private action for damages, under
liability could amount to hundreds of milli
dollars, primary weight should be placed
language of the statute and on clear, uneq
statements by those responsible for its enactm
the Supreme Court has recently emphasized, "a
clearly expressed legislative intention to the cor
the plain language of a statute "must ordina
regarded as conclusive." *Consumer Product
Commission v. GTE Sylvania, Inc.,* 48 U.S.L.W
4659 (June 9, 1980). Extrapolations based on go

thin fabric, requiring speculative assur
Congress' intent are to be avoided. To r
weak inferences is to indulge in judicial
as the majority states (footnote 17) was
the 1974 amendments to the Commodity
Congress makes a *"complete overhaul"*
expressly creating other remedies, it is
expect that it will indicate any intent to
important right as that to bring a priv
express grant, which would take but
rather than by silence.

A GENERAL OVERVIEW OF
COMMODITIES EXCHANGE

Before turning to the specific lan
Commodity Exchange Act, 7 U.S.C. §§ 1,
upon by appellants as the basis for t
implied private rights of action agai
commission merchants and brokers, §
U.S.C. §§ 6b, 13(b), and (2) exchange
markets, §§ 5(d), 5a(8), 7 U.S.C. §§ 7(d),
overview of the Act is helpful. Trading
futures has dramatically increased over
century, giving rise to problems of publ
such as the dangers of price manipulatio
markets and fraud by broker-dealer
customers. As these problems increased,
public supervision and control of marke
became necessary. From 1922, when Co
the Grain Futures Act to give the
Agriculture supervisory power over gra
until 1974, when the Commodity Fu
Commission Act was enacted, creating a

dent agency, the Commodity Futures Tr
sion (CFTC) with plenary and exclusive
both futures markets and traders on
Congress has gradually increased public
point where we now have an elabor
scheme designed to assure the public
orderly futures trading, and to prevent
tion, fraud and sudden or unreasonable
tions in commodity prices.

This extensive all-embracing system w
House and Senate Reports as intende
"uniform," "comprehensive," "complete"
regulatory structure. H.R. Rep. No. 93-9
S. Rep. No. 850, 95th Cong., 2d Sess.
The Act authorizes a wide variety of
nisms, including the licensing of cont
and trading personnel, and a full pano
ment powers, both administrative and j
ing procedures for the award of damages
proceedings, arbitration, imposition of c
to $100,000 for violations, issuance of c
orders with fines of up to $100,000 pe
compliance, conduct of investigations
compel attendance of witnesses and
documents, revocation of an exchange
suspension of members of exchanges
privileges, institution of proceedings in
compel compliance with orders or to enjo
the Act, and the assessment of crimina
violations of the Act and price manipu
punishable by a fine of not more tha
imprisonment up to five years, or both

Provisions for Regulation of C

Under the Act the CFTC is
power to designate contract excl
particular commodities, § 5 of
Futures contracts may lawfully b
"contract markets" as are designat
traded, §§ 4 and 4h of the Act, 7
order to be so designated as a co
continue to conduct business as su
meet rigid requirements, includ
procedures for the prevention o
§ 5(d) of the Act, 7 U.S.C. § 7(d).
places additional requirements o
including the requirement that it
that have been approved by the
Act, 7 U.S.C. § 7a(8). The CFTC
violative of the Act or of its re
exchanges to adopt additional ru
U.S.C. § 12a(7).

If a contract market violates the
of its designation the CFTC is em
revoke its designation, § 5b, § 6
§ 7b, § 8. In addition it may co
tions as it deems necessary to asce
Act, 7 U.S.C. § 12(a), issuing suc
as is needed for production of witn
§ 6(b) of Act, 7 U.S.C. § 15. The
issue its own cease and desist ord
found after hearing to be viola
regulations thereunder, and asses
to $100,000 for each violation, §
§ 13a. Refusal to comply with a C
order is a misdemeanor punisha

$100,000 or imprisonment of n
nor more than one year, or b
noncompliance. *Id.* The CFTC n
against violation of the Act or r
including an injunction or rest
existing or threatened violations
compelling an exchange to cor
U.S.C. § 13a-1. It may also direc
take emergency action to mainta
§ 8a(9) of the Act, 7 U.S.C. § 12a
subject to criminal penalties for v
price manipulation, felonies puni
fine of $500,000 and prison terr
Act, 7 U.S.C. § 13(b).

Provisions for Regu
Futures Commission

The CFTC has equally awesome
over brokers and futures co
(FCMs). It establishes requireme
brokers as futures commission me
4k, 4p, 8a, of Act, 7 U.S.C. §§ 6
Two substantive provisions of th
relevant here. Section 4a autho
quantitative limits on speculati
§ 6a, and by regulation the CFT
short trading. 17 C.F.R. § 150.1
any members of any exchange
customer in connection with a s

The CFTC is authorized to den
any person violating the Ac
manipulate commodity prices
revoke the registration of a

merchant for violations. §
may also suspend, expel
exchange member or deny
§ 8c(1) of Act, 7 U.S.C. §
abettors, § 13 of Act, 7
affirm, reverse or modify
own members, § 8c(3)
Violations of the Act and
tion are felonies punishabl
to 5 years imprisonment
$500,000, § 9(b) of Act, 7
the CFTC may issue cease
broker engaged in or att
§ 6(c) of Act, 7 U.S.C. §
tutes a misdemeanor pur
$100,000, imprisonment o
more than 1 year, or botl
obey. *Id.* The CFTC may
mandamus and injunctive
§ 6c of Act, 7 U.S.C. § 1

Provisions for
Persons Injur

The Act also provides de
compensate persons dama
Contract markets are re
arbitration procedures fo
complaints up to $15,0
employee, § 5a(11) of Act
course, contemplates a s
resolving smaller claims.

A much more comprehe
tory remedy available to

provided by § 14 of the
provides for the insti
"reparations" proceedin
includes plaintiffs here)
under §§ 6d, 6e, 6j and
futures commission merc
violation of any provis
regulation or order ther
first to review the facts
it believes these warrant
of the complaint to the
response. If the CFTC
registered merchant or
must determine the amo
the offender to pay the
its order is not sati
enforcement in the fed
complainant resides, whi
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Unless the registrant
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appeal to a federal court
to review the order, the
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Applicab

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Inc., and Thomp
Kohlmeyer, Inc.) p
§ 6d, are complet
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To the extent th
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2 As a result of th
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Rule § 44.02, whic
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Thus the Act, f
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3 Here the CFTC
Mercantile Excha
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As for defend
(opinion, p. 49) t
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can claim that we
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THE S
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its langua
v. Davis,
U.S. 551,

are speculators in the futures market, are not claiming fraud on the part of broker-dealers who handled their accounts but fraud on the part of other brokers with whom they had no relationship who allegedly participated in a conspiracy with short sellers and others to artificially depress the price of May 1976 potato futures through manipulation and excessive short sales in violation of the Act.

Section 4b reads in pertinent part:

> *"It shall be unlawful (1) for any member of a contract market* . . . in or in connection with *any order . . . for or on behalf of any other person,* or (2) *for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery . . . for or on behalf of any other person. . . .*
>
> (A) to cheat or defraud or attempt to cheat or defraud *such other person;*
>
> (B) willfully to make or cause to be made to *such other person* any false report or statement thereof, or willfully to enter or cause to be entered for *such person* any false record thereof;
>
> (C) willfully to deceive or attempt to deceive *such other person* by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for *such person."* (Emphasis added.)

Only the person on whose "behalf" a contract is made by a member is protected by § 4b from the fraud and deceit on the part of that member in the making of a

futures contract. The "person" is the customer for whom the futures contract is made. The introductory paragraph defines the subject matter of the action in terms of a "contract of sale . . . for or on behalf of any other person." Subsections (A), (B) and (C) then limit the prohibited activities to certain forms of fraud by the broker upon "such other person" (i.e., his customer). The offense, therefore, exists only when a member cheats or defrauds *his own customer.*

Nowhere does § 4b mention parties having no connection to the contract. Nor, despite the majority's effort to strain a broader coverage out of the section's language, is there any indication that Congress intended to create the massive liability that would result if broker-dealers were made liable to every trader active in the market at a given time. See *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 733 n.5 (1975) ("The wording of § 10(b), making fraud *in connection with the purchase or sale of a security* a violation of the Act, is surely badly strained when construed to provide a cause of action, not to purchasers and sellers of securities, but to the world at large" (emphasis in original)). The express mention of customers only as beneficiaries, just like the mention of purchasers and sellers in *Blue Chip Stamps,* negates any intent to include anyone else.

There is no support in the legislative history for the majority's broad reading of § 4b. To the contrary, language in relevant House Reports indicates just the opposite. The 1934 House Report on what was to become § 4b states:

> "Section 4b prohibits traders in acting *for customers in futures transactions to cheat, defraud, or deceive customers,* or to bucket or offset such

orders against orders for others." H. R. Rep. No. 1637, 73d Cong., 2d Sess. 5 (1934). (Emphasis added).

The 1935 House Report confirms that interpretation:

"Section 4b makes it unlawful for members of contract markets, and correspondents, agents, and employees thereof, in connection with orders to make or the making of contracts of sale of any commodity in interstate commerce to cheat, defraud, or deceive *the customer,* or to bucket the order." H. R. Rep. No. 421, 74th Cong., 1st Sess. 5 (1935). (Emphasis added).

The legislative history of the 1968 amendments also refutes the majority's contention. Speaking in support of legislation to amend § 4b, Representative Hathaway introduced the testimony of Assistant Secretary of Agriculture Mehrens, who had testified before the House Committee on Agriculture, stating in part: "We ask that this provision [§ 4b] be expanded to cover all persons who handle *customer* orders or funds. . . . The proposed legislation . . . would . . . give *customers* who deal in commodity futures with nonmembers the full protection of the Act." 113 Cong. Rec. 23651 (Aug. 22, 1967). See S. Rep. No. 947, 90th Cong., 2d Sess. 6 (1968). There was no indication that non-customers, such as plaintiffs here, were entitled to invoke the section against third parties who were not their brokers or fiduciaries. See in accord, *Chipser v. Kohmeryer & Co.,* 600 F.2d 1061, 1065 (5th Cir. 1979) ("Section 4b makes it unlawful for a commodities broker to 'cheat or defraud' a *customer* or willfully deceive or make false statements or reports to a *customer* in connection with

transactions on the commodities exchange." (Em
added)).

Aside from the fact that § 4b is limited to prot
of customers against fraud on the part of broker-d
acting on their behalf, there is nothing in the s
indicating that Congress intended to provide even
customers, much less others such as appellants,
private civil remedy against broker-dealers. Th
preme Court has repeatedly stated that before a p
right of action will be implied it must be shown
"necessary" to effectuate Congress' purpose. *Ch*
Corp. v. Brown, 441 U.S. 281, 317 (1979) (private
of action not necessary since plaintiffs ha
alternative remedy); *Piper v. Chris-Craft Indu*
Inc., 430 U.S. 1, 41 (1977); *Santa Fe Industries,*
Green, 430 U.S. 462, 477 (1977). Here a private r
would not be necessary to enforcement of § 4b,
the existing administrative procedures provided
Act, including the award of reparations, amply p
the customer. The creation of an implied p
judicial remedy would not only be unnecessar
would run counter to Congress' established rem
since the customer could hardly seek damages in
court action without waiving his right to recov
same damages in a reparations proceeding. A p
right would therefore be duplicative.

Nor does the language of § 9(b) of the Act, 7
§ 13(b),[5] the other section of the Act relied

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5 Section 9(b) reads:

"(b) It shall be a felony punishable by a fine of not m
$500,000 or imprisonment for not more than five years,
together with the costs of prosecution, for any p
manipulate or attempt to manipulate the price of any co
in interstate commerce, or for future delivery on or subje
rules of any contract market, or to corner or attempt

plaintiffs, sustain a private right of action here. criminal statute to be enforced by criminal penal was specifically recognized by Congress wl amended the provision in 1936. H.R. Rep. N 74th Cong., 2d Sess. 9 (1935). There is no langu § 9(b) even remotely suggesting that it was enac the "especial" benefit of a special class of plantiffs are members. Indeed, the statute ma reference to any beneficiaries at all. Like § 206 Investment Advisors Act construed in *Transa supra,* it "simply proscribes certain conduct, an not in terms create or alter any civil liabilities." Ct. at 247. To spell a private right of action out a general criminal statute would permit anyor claimed to have been injured by a violation of t to sue, regardless of Congress' intent. The Su Court "has been especially reluctant to imply ca action under statutes that create duties on the persons for the benefit of the public at large," *C supra,* 441 U.S. at 692 n.13; *Cort v. Ash, supr* U.S. at 79-80 (18 U.S.C. § 610, prohibiting co contributions), and it has rarely implied a ca

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any such commodity, or knowingly to delivery or cau delivered for transmission through the mails or in i commerce by telegraph, telephone, wireless, or other communication false or misleading or knowingly i reports concerning crop or market information or condit affect or tend to affect the price of any commodity in i commerce, or knowingly to violate the provisions of secti 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title, or kno make any false or misleading statement of a material fa registration application or report filed with the Comm knowingly to omit in any application or report any mat that is required to be stated therein. Notwithstan foregoing, in the case of any violation described in the sentence by a person who is an individual, the fine sha more than $100,000, together with the costs of prosec

action under a criminal statute. *Chry*
Brown, supra, 441 U.S. at 316. Despite
protestations, this is not one of those r

Nowhere else in the language or str
Commodity Exchange Act can one find
implied intent to benefit a special cla
commodity speculators such as plainti
reason is that the Act was not enacted for
benefit of any particular class but to pro
and primarily producers and customers,
sudden or unexplained fluctuations in
commodities, which could ruin produce
serious hardship to consumers, process
disers, millers, dealers, and shippers. T
clear by Congress in its declaration of
policies underlying the Act, found in § 3
U.S.C. § 5, which has remained virtual
since its enactment in 1922. Section 3

> "Transactions in . . . 'futures' are
> national public interest; . . . the pri
> such transactions are generally qu
> seminated . . . as a basis for de
> prices to the producer and the
> commodities and the products an
> thereof and to facilitate the moveme
> interstate commerce; such transactio
> by shippers, dealers, millers, and oth
> handling commodities and the
> byproducts thereof in interstate c
> means of hedging themselves agains
> through fluctuations in price; the tr
> prices of commodities on such board
> susceptible to speculation, manipula
> trol, and sudden or unreasonable

> the prices thereof frequently occur
> such speculation, manipulation, or
> are detrimental to the producer or
> and the persons handling commodi
> ucts and byproducts thereof in inters
> and such fluctuations in prices are
> to and a burden upon interstate
> commodities and the products ar
> thereof and render regulation impe
> protection of such commerce and
> public interest therein."

Congress' solicitude was recently su
testimony in 1974 of the Administ
Commodity Exchange Authority (the
CFTC), Alex Caldwell, before the Sena
considering proposed amendments to th

> "Originally back in 1922 it was
> Congress that the Commodity Exch
> designed to protect producers. It is
> that it is not designed only to prot
> but also the merchandisers and
> ultimately the consumers." Hearings
> 2578, S. 2837 and H.R. 13113 Bef
> Committee on Agriculture and
> Cong., 2d Sess. at 234 (1974).

The congressional debate on the 197
amply confirms that the Act was not de
especial benefit of speculators. Represent
member of the Committee on Agricultur
stated "The purpose of the legislation b
can best be described as a means for
fairest possible market for legitimate

H.R. 13113 will provide those
reasonably necessary to guide th
tors . . . and no legitimate sp
object to its provisions." 80 Cong.
1974). Representative Zwach, a
Committee, stated "This legislatio
umpire, a commission that wi
interests, the producers' inter
interest." *Id.* at 10740. Represen
that "Our experiences . . . demo
effects which unfair trading p
consumers and producers alike."
Senator Scott claimed that "For t
will mean that commodity pric
reflect demands and actual availa
of speculation which places artif
will be under close scrutiny. T
realistic prices for the farmer and
break for the consumer will likev
rapid increase and decrease in de
30467 (Sept. 9, 1974).

Although speculators were reco
the extent that they might, b
volume and assuming market
liquidity in the market for the be
consumers and thus hopefully m
tions to achieve some of the
stability considered beneficial, Co
a dim view of speculative activi
futures market because of the
posed to farmers, producers, c
shippers and hedgers. Unlike a
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interest in the cash market for it,

as a means of minimizing his risk
as plaintiffs here, has no underly
market. He merely attempts to p
of prices for commodity future
attitude toward the benefits
speculators is further demonstr
§ 3, which outlines the Act's
speculators or investors as benef
does refer expressly to the inte
"consumer," "shippers, dealers,
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omission explained by the majo
Congress desired to state a com
the legislation. If speculators
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consistent with a desire to i
Clause.

The various House and Senate
its various amendments over the
the plain language of § 3.
Committee stated with respect
Futures Act of 1922 (the first v
become the Commodity Exchan

> "It is believed that this b
> obvious abuses that are p
> changes, result in more
> thereby enable the *producers*
> the market price for the
> possible in the past.
>
> *"Its primary purpose is t*
> *market some of the und*
> *professional speculators.*

> "In addition to curb
> manipulation, the bill
> Agriculture to provid
> of the exchanges fr
> misleading reports o
> conditions. This in it
> activities of professi
> added). S. Rep. No. 2
> (1921).

In 1936 the Senate Rep
ments stated:

> "It is of utmost im
> adopted whereby the
> position to protect t
> generally against abu
> trolled speculation on
> 1431, 74th Cong., 1s

The 1936 House Report
President Roosevelt's first
urged Congress to elimina
destructive speculation" an
the use of exchanges for s
H.R. Rep. No. 421, 74th
78 Cong. Rec. 2264 (193

> "The fundamental pu
> insure fair practice
> commodity exchanges
> control over those f
> which too often den
> injury of producers
> exchanges themselves

"Since the passage o
of 1934 there has
tendency on the part
transfer their acti
markets, a tendency
this bill without fu
tance." *Id.* at 2.

The 1974 House Rep
President Roosevelt's att
No. 93-975, *supra*, at (i
both 1974 and 1978 used
the above quoted langu
Report. S. Rep. No. 113
(1974); S. Rep. No. 850, 9
The majority contends t
injury to the "markets th
protect speculators. But
legislative history refute
intended to protect excha
own members and oth
speculators from thems
supra, at 14; S. Rep. No
Throughout all these
nizes, the congressional
vituperative attacks on
1922 and 1936, e.g., 61
(1921) (Remarks of Senat
is to survive, "the grain
Cong. Rec. 7857 (1936)

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[6] As stated by this court in
550 F.2d 762, 768 (2d Cir. 1
Act is the elimination of wr
It is they, not the exchange

that "the grain p
increased if the w
controlled"). Congr
though tempered,
113 Cong. Rec. 3
Representative Su
futures . . . has
surges in the futu
increases in consu
(Sept. 9, 1974) (Re
gives the comm
inflationary price
demand—but are

Moreover, it h
Congressmen repr
consistently oppos
tion of the commo
it is they who are
No. 1522, 73d Cor
H.R. Rep. No. 93-
report) ("We believ
a lack of faith in
. . ."); 120 Con
(Statement of Re
"more not less"
investors do benefi
a far cry from con
their "especial be
"Speculation may r
beauty and a joy
(August 11, 1967)
Agriculture Mehre
Agriculture, quote
sentative Smith in
that speculation w

"When the
Federal regu
Act—it was
gamblers wo
the liquidity
could readily
"The Comm
limit and reg
with hedging
or unreason
which are
consumer an
. . .' Clearly
permits com
those who
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primary purp
1974).

Thus, given th
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especial benefit
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of Congress. Nor
or of its provision
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The Court's langu
Inc., supra, 430

"As previou
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Ibid. T
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Accord, *Li*
1979) (not
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Thus § 9(b), like § 4b, does not disclose any desire to benefit a special class of which plaintiffs are members. When read in the light of the Act's overall purposes it appears to have been enacted for the benefit of the public, including producers and consumers of commodities, not that of speculators or investors.[8] In any event,

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history does show an intent to offer *some* protection to speculators, there is no suggestion that Congress enacted the statute for the *especial* benefit of speculators or intended to confer a private right of action in favor of speculators. Indeed, the legislative history is just to the opposite; Congress was primarily concerned about producers and consumers.

The majority's reliance on our decision in *Ames v. Merrill Lynch, Pierce, Fenner & Smith*, 567 F.2d 1174 (2d Cir. 1977), as supporting a private right of action is similarly misplaced. There the dispute involved a *customer and his broker* and we declined to compel arbitration, noting that "on this appeal, we are not called upon to decide whether the complaint states a claim for relief." *Id.* at 1176. Thus, the court's passing statement that the Act was enacted for the protection of "investors" has no bearing whatsoever on the question before us, whether the Act was designed for the especial protection of these plaintiffs, who are speculators, not customers.

Footnote 25 of the majority opinion suggests that regulated persons may belong to the class for whose special benefit a statute is enacted, with which we do not disagree. However, where (as here) Congress has specifically enumerated the persons for whose benefit the statute has been enacted (i.e., the public, producers, consumers, shippers, dealers, millers and hedgers) but has studiously omitted speculators, we may reasonably infer that Congress did not intend to include speculators among the benefited group.

8 Some of the plaintiffs here also allege that the defendant brokers have violated § 4a of the Act, 7 U.S.C. § 6a. Section 4a states in relevant part that "Excessive speculation in any commodity under contracts of sale of such commodity for future delivery . . . causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, *is an undue and unnecessary burden on interstate commerce in such commodity*" and authorizes the CFTC to fix quantitative limits on trading "for the purpose of diminishing, eliminating, or preventing such burden. . . ." (Emphasis added). The CFTC has set by regulation certain limits on short trading which are alleged to have been violated by the short sellers with the knowledge of their brokers. 17 C.F.R. § 150.10.

No court has ever found a private cause of action to exist under § 4a. The section serves as a general prohibition against excessive

even assuming *arguendo* that this criminal statute benefits speculators, there is not the slightest suggestion in the language or legislative history of § 9(b) that Congress impliedly intended it to be enforced by private civil suits for damages. The remedies provided by Congress are found elsewhere in the Act.

(2) *Sections of Act relied on by plaintiffs to support claims against the contract market defendant.* (§§ 5(d), 5a(8) and 9(b), 7 U.S.C. §§ 7(d), 7a(8) and 13(b))

Appellants rely upon portions of §§ 5 and 5a of the Act, 7 U.S.C. §§ 7 and 7a, and to a lesser extent on § 9(b), 7 U.S.C. § 13(b), already discussed above, as the

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speculation in commodity futures and its purpose—the removal of the burden of excessive speculation on interstate commerce in order to stabilize the price of the commodity itself, not the price of the future contract—is clearly described. The plain language of the section, then, indicates that it was designed for the protection of the general public. Nor is there any suggestion that Congress intended to confer any private right of action upon any person, let alone a speculator, who might be claimed to be damaged as a consequence of a violation of the section. See *Transamerica, supra*, 100 S. Ct. at 247; *Kissinger, supra*, 48 U.S.L.W. at 4226. Only one case has even addressed the issue of an implied cause of action under § 4a and it concluded that investors were not within the class of persons for whose especial benefit the statute was created, reasoning that "the excessive speculation provision is primarily intended to protect outsiders from the activities of all speculators, not speculators from themselves." *Liang v. Hunt*, 477 F. Supp. 891, 893 (N.D. Ill. 1979).

Plaintiffs also charge that the defendant brokers violated Exchange Rule § 44.02 by failing to have liquidating orders placed within five minutes after the close of the trading limits even though they knew or should have known that their customers could not deliver potatoes. Since it is now well recognized that a private right of action may not be implied for a violation of a rule of the New York Stock Exchange, *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980), it is not surprising that the majority makes no effort to claim that plaintiffs here have a cause of action against the brokers for their alleged violation of Exchange Rule § 44.02. Accordingly, we need not address the issue.

source of an implied private right of action against New York Mercantile Exchange and its officers. Section 5 is a licensing statute which imposes upon the CFTC the duty of designating boards of trade as "contract markets" provided they comply with specified conditions and requirements, including in subdivision 5(d) "the prevention of manipulation of prices and the cornering of any commodity by the dealers and operators" upon the Exchange.[9] Section 5a, 7 U.S.C. § 7a, provides that each contract market shall comply with 12 requirements, including the enforcement of its own rules, regulations and resolutions which have been approved by the CFTC, § 5a(8) of the Act, 7 U.S.C. § 7a(8).[10]

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9 Section 5 provides in relevant part:

"The Commission is hereby authorized and directed to designate any board of trade as a 'contract market' when, and only when, such board of trade complies with and carries out the following conditions and requirements:

a. [when it is located in a terminal market where any cash commodity is sold in sufficient quantities so that futures contracts fairly reflect the general value of the commodity]
b. [when it provides for the filing of reports concerning the transactions occurring on the exchange]
c. [when it provides for the prevention of the dissemination of false information by the board or any member]
d. When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board. . . ."

10 Section 5a(8), 7 U.S.C. § 7a, reads in relevant part:

"§ 5a *Duties of contract markets*

"Each contract market shall—

* * * * *

"(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have

Plaintiffs here allege that the New York Me
Exchange violated the Act and the Regulati
failing (1) to maintain an orderly market for trac
to report violations, (3) to direct the er
liquidating orders, (4) to declare an emergency
extend the period for delivery or to allow deli
truck, (6) to buy potatoes for the account o
sellers who did not make delivery as required b
contracts, and (7) to perform its duties as a c
market, including exercise of due care t
manipulative practices.

As the Court pointed out in *Cannon, supra,* 4
at 690 n.13, a statute will ordinarily be consti
creating an implied private remedy only wh
"explicitly conferred a right directly on a cl
persons including the plaintiff in the case." He
prescriptive language of § 5 and § 5a, like the re
statute in *Redington, supra,* 442 U.S. at 569, "d

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been approved by the Commission pursuant to paragrap
this section; and revoke and not enforce any such by
regulation, or resolution, made, issued, or proposed by it
governing board thereof or any committee, which
disapproved by the Commission; . . ."

In addition to subsection (8), § 5a requires contract mark
furnish the CFTC with copies of its by-laws and regulatio
records of all of the proceedings of its governing board, (2
the operators of the warehouses to keep records and ma
available for inspection by the CFTC, (3) obey CFT
concerning the delivery of the cash commodity, (4) require
making delivery to furnish notice of intended delivery to
obligated to accept delivery, (5) require that warehouse re
accepted as satisfaction of debt, (6) enforce its by-l
regulations relating to the minimum financial standards re
those future commission merchants who are members of the
(7) permit delivery of any commodity in a location which wi
prevent price manipulation, (8) provide for an arbitration p
for customer grievances, § 5a(11), and (9) submit to the C
approval its by-laws, rules, regulations and resolutions. §

by its terms, purport to create a private cause o
in favor of anyone." Neither provision "grants
rights to the members of any identifiable cla
proscribes any conduct as unlawful," *id.* They th
cannot support a private cause of action in f
these plaintiffs.

Nothing in the foregoing sections of the Act p
any basis for an inference that they were enac
the especial benefit of plaintiffs, much less
private right of action was intended. Here
Congress' adoption of a battery of other
remedies indicates it had no intent to create or
an implied private right of action against exc
See *Transamerica, supra,* 100 S. Ct. at
Although exchanges may not be the sub
reparations proceedings, if they violate the
CFTC may suspend or revoke their designa
contract markets, §§ 5b, 6(a) of the Act, 7 U.S.C
8, sue in federal courts, which are expressly vest
jurisdiction, to enjoin violations, 6c of the Act, 7
§ 13a-1, assess civil fines of up to $100,000 f
violation and issue cease and desist order
compliance with which subjects the market
officers to a $100,000 fine or imprisonment. § 6
Act, 7 U.S.C. § 13a. The exchanges, of course,
subject to criminal penalties of up to a $500,0
and 5 years imprisonment for violations of the
price manipulation. § 9(b) of Act, 7 U.S.C. § 1

Lastly, in 1968 Congress failed to enact a bil
would have made contract markets liable to ap
persons for violations of the Act. H.R. 917
Cong., 1st Sess. § 32 (1967); see Statem
Representative Fino introducing the bill, 113
Rec. 10839 (April 26, 1967). This indicat

Congress did not intend to sanction a
against exchanges.[11]

OTHER CIRCUMSTANCES POSSIBI
ON LEGISLATIVE INTENT TO C
APPROVE AN IMPLIED PRIVAT

(1) *Pre-1974 lower federal court deci*
private rights

Faced with the fact that nothing in
the Commodity Exchange Act, the vario
of it over the years, and its legislati
remotely suggests congressional inte
much less create, an implied private rig
majority relies almost completely on the
to the 1974 amendments various lower
beginning in 1967, had implied certain
rights of action under the Act and
failure, in face of these decisions,
extinguish or nullify these decisions m
evidence of an intent *sub silentio* t
continued implication of private acti
Act.[12] In short, the argument goes, in an

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11 Significantly, the 1968 amendments consiste
these, 13 sections and 3 subsections are ider
Representative Fino's bill, Pub. L. No. 90-258 §
9, 10, 11, 13, 14, 15, 18, 19, 22, 30, 34; 82 Sta
and 8 sections and 2 subsections are alter
provisions, Pub. L. No. 90-258 §§ 2, 4, 5, 7(b),
25; 82 Stat. 26, *et seq.* (1968). This indica
Congress acted with discrimination and care i
provision authorizing private damage suits.

12 *Anderson v. Francis I. duPont & Co.*, 291 F.
Minn. 1968); *Hecht v. Harris, Upham & Co.*, 28
(N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9t

in 1974 Congress had the burden of tal
action to disapprove implied private
some courts to have existed under the
absence of its doing so, the holdings of
may be presumed to survive.

The argument puts the cart before th
as here, Congress has expressly provi
and administrative means of enforcemer
on plaintiffs to show a clear and affir
sional intent to approve a private right
Congress or defendants to show tha
provided by it are exclusive. *Transame*
S. Ct. at 247; *Securities Investors Pro*
Barbour, supra, 421 U.S. at 419; *Amt*
U.S. at 458. The issue is whether Cong
approve a private right of action, not
majority frequently states, maj. opin.
intended to "destroy" or "eliminate"
private right, which assumes the matter
Nor may we simply presume that C
silence intended to approve a "pre-e
right of action, since the Supreme Court
that "in the absence of the clearest

Egg Producers v. Bauer International Corp.,
1384 (S.D.N.Y. 1970); *Booth v. Peavey C*
Services, 430 F.2d 132, 133 (8th Cir. 1970); *Mc*
& Co., 340 F. Supp. 1338, 1343 (E.D. La. 1972)
(5th Cir. 1973); *Gould v. Barnes Brokerage Co*
294, 295 (N.D. Tex. 1972); *Johnson v. Arth*
Hamil & Co., 341 F. Supp. 764, 766 (S.D.N.
Bache & Co., 377 F. Supp. 61, 65 (M.D. Pa. 19
Schreiber & Co., 479 F.2d 529, 534 (7th Cir.), *r*
sub nom., Chicago Mercantile Exchange v. De
(1973) (per curiam); *Seligson v. New York Prod*
Supp. 1076, 1084 (S.D.N.Y. 1974), *affd. sub*
York Produce Exchange, 550 F.2d 762 (2d Ci
U.S. 423 (1977).

Congress intended that" a new
serve" a pre-existing private cau
"decline" to imply one under the
Inc. v. United States, supra, 359
otherwise is to stand the princip
the more recent Supreme Cou
heads. Quite apart from this fu
argument must be rejected for t
examination of the decisions a
relied on by the majority demons
support a *sub silentio* intent by
approve implied private rights c

In the first place the earlier de
history do not reveal any long-re
of action in favor of speculato
against contract markets or brok
the speculators had no custom
For 45 years prior to the first de
majority the provisions of the Ac
through use of the administr
available to the Secretary of
Commodity Exchange Commissi
the CFTC, and through crimir
upon violations of the Act. Des
the manipulation of the onion
1950's, see S. Rep. No. 1631,
1958), reprinted at 1958 U.S. Co
4210, 4214, the salad oil swindle
Miller, The Great Salad Oil Sw
publicized schemes to manipul
defraud participants, and despit
private right of action under the
as 1944, *Baird v. Franklin,* 141 F
denied, 323 U.S. 737 (1944), n

suggested that a private cause
might exist.[13] Even the Commo
sion believed that administrativ
penalties were the only means
be enforced. See letter from Dep
Commodity Exchange Author
1958, to counsel for the
Agriculture and Forestry, repri
Cong. & Admin. News 4216.[14]

Goodman v. H. Hentz & Co.,
Ill. 1967), was the first case to
significant not because it was th
the case on which all of the lat

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13 The majority opinion (footnote
statement as implying that "victims
never resorted to the federal cour
whereas we actually state that prior
held that a private cause of acti
recognized. There may well have beer
the claims made in these suits is not
prior to 1967 no court to our know
here, i.e., the existence of an implie

14 The letter reads in relevant part:

"Dear Mr. Stanton [Counsel
United States Senate.]

. . .

"You requested a memorandun
absence from these bills of any p
the Commodity Exchange Act
proposed section 4j a violation of

"As you recognize, in the abs
violations of the proposed section
statute, it would appear that th
afforded by the act would b
complaints. [Emphasis added].

"Sincerely,

Rodger R.
Administ

private cause of action s
were lower federal court
never passed upon the is
brought under § 4b by
broker-dealer in which
frauded by the broker-d
§ 286 of the Restateme
customers fell within th
intended to protect w
customers) and that vic
statutory tort for which
remedy. The court als
Wheeldin v. Wheeler, 3
which stated that private
legislature evidences a co
indication in the Com
Congress intended not to
by violations access to th
the court implied a priv

It hardly merits discus
current law, was wrongly
purport to consider, as r
Cannon, Redington, Tra
earlier by *Cort v. Ash*,
create a private right of
Indeed, the Court has
rationale relied upon in
of Congressional intent
action. See, e.g., *Reding*
578, quoting *Cannon*, s
significantly, perhaps, is
been incorrectly decided
The proposition that a p
implied unless Congress

unsupported by any
accurately reflect the sta
existed. Even *J.I. Case*
426, widely considered
Supreme Court has gon
cause of action, required
the *Goodman* court. The
whether a private right
effectuate Congress' inte
at 432.

Nor can we presume th
decision simply because
which private rights of a
by the courts. The majo
which courts were ther
action, ignoring such case
U.S. 647 (1963); *T.I.M.*
U.S. 464 (1959); *Monta*
Northwestern Public Ser
General Committee v.
(1943); *General Committ*
U.S. 338 (1943); *Swit*
Mediation Board, 320 U
rejected such claims of p
area of securities, the c
action. E.g., *Colonial Rea*
F.2d 178 (2d Cir.), *cert.*
O'Neill v. Maytag, 339 U

The majority contends,
of the *Goodman* decisio
following it, is irrelevant
instead is whether Congr
correct when it enacted
even accepting this prop

approval of thes
history of the 1
less mention of
Moreover, the lo
majority do not
decided prior to
against their b
speculators like
whom they had
Francis I. du Po
1968); *Hecht v. F*
(N.D. Cal. 1968)
1970); *Booth v.*
430 F.2d 132 (5t
Shearson, Hamil
1972); *Gould v.*
Supp. 294 (N.D.
Co., 340 F. Supp
113 (5th Cir. 197
Supp. 61 (M.D. I
recent decision, (
and Smith, Inc.,
12, 1980), relied
of this case since
against his broke
Although § 4b
protecting custo
brokers, it certa
plaintiffs here,
persons with wh
ship.

To be sure, th
action in favor
against his broke

purpose of infe
ceived" the state
1974. In *United*
Corp., 311 F. S
relying on *Good*
§ 9(b) of the A
producers, not c
injunctive relie
company to pre
investment infc
Produce Exchan
affd. sub nom.,
Cir.), *cert. deni*
relying on *Deak*
was available to
a trader, against
case, however, w
the 1974 amend
aware of it. It
majority's theor
thought it unn
private right of

Thus plaintiff
L.D. Schreiber &
other grounds s
v. Deaktor, 414
year before the
support for the
There a trader
violation of § 5a
Goodman, found
interests of th
implied a cause
§ 5a(8). Althou

Supreme C
support fo
right of ac
the Court
held that
not throug
Supreme C
serious er
hidden ind
issue after
Deaktor is
In specu
"perceived"
implied rig
must take
not finally
December
decision in
January 9,
implied pri
relying on
its express
"when leg
remedy or
coverage o
414 U.S. a
The maj
"[d]uring t
widespread
implied ca
provisions
opinion, p.
infer that
assumed th

of action under the Commodity Exchange Act as they had under the securities laws. That argument has a number of serious flaws.

First, the Supreme Court in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 2, 13 n.9 (1971), merely acquiesced in the *25-year old* acceptance by the lower courts of an implied private right of action under § 10(b) of the Securities Exchange Act. See *Cannon, supra,* 441 U.S. at 690-93, n.13, which suggests that absent that long-standing prior interpretation the Supreme Court would not have found a private right of action under § 10(b). Since there is no such long-standing history of judicially implied rights under the Commodity Exchange Act, there is simply no basis for inferring that Congress could have assumed that the Court would similarly acquiesce in a private right of action under that Act.

Second, the majority seems to suggest that, because a number of the early securities cases implied a private right of action under the securities laws even though those laws contained express remedies, Congress could assume that the courts would similarly imply a private right of action under the Commodity Exchange Act, which also contains a number of express remedies. That is simply not the case. In *Baird v. Franklin,* 141 F.2d 238, 244-45 (2d Cir.), *cert. denied,* 323 U.S. 737 (1944), heavily relied on by the majority, Judge Clark implied a private right of action under the Securities Exchange Act of 1934 because the express remedies were merely punitive and remedial, not compensatory. Section 14 of the Act here, in marked contrast, expressly provides for compensatory damages. Since the securities laws provide for less complete remedies than the Commodity Exchange Act, any analogy between the judicial history

of private rights of action under the securities laws and the Commodity Exchange Act is bound to be of limited relevance.

Third, the majority seeks to distinguish such cases as *Transamerica, supra,* 100 S. Ct. 242, and *Redington,* 442 U.S. 560, on the ground that the 1974 Amendments were passed well after the "great explosion" of judicially recognized private rights of action. The majority, however, ignores the fact that the sections of the Act most heavily relied on by plaintiffs, §§ 4b, 9(b) and 5d, were all enacted in 1923 and 1936, well before any "explosion" in private rights of action. Like the statutes in *Redington* and *Transamerica,* nothing in the legislative history of 1923 or 1936 indicates that Congress intended to create a private right of action under any of the provisions relied on by plaintiffs.

As the law existed prior to 1974, then, the majority's contention that the courts had long recognized a private right of action in favor of these plaintiffs rings hollow. The Supreme Court had never spoken on the subject. No lower federal court had implied a cause of action under § 5(d), § 5a(8), or § 4a. Nor had any court implied a cause of action in favor of one not a customer against a broker-dealer under § 4b. *Deaktor,* which implied a cause of action in favor of a speculator against an exchange under § 9(b), had been decided less than a year before the enactment of the 1974 amendments. This decision, which was never mentioned in the congressional debates as a basis for an implied right of action, is the sole case which could conceivably be relied upon as pre-1974 authority for the proposition advanced by the majority here that Congress "perceived" the private rights of action to be available under the Act in favor of speculators against brokers or

exchanges. It seems most unlikely that Congress had even heard of it, much less relied upon it, in adopting the 1974 amendments. Given the crucial importance of *Deaktor* to the majority's argument, Congress' failure to mention *Deaktor* is highly significant, despite the majority's protestations to the contrary. Absent some indication that Congress knew that a lower court had implied a private right of action in favor of a *speculator against an exchange,* as opposed to its possible knowledge that the court had implied a private right of action in favor of a *customer against his broker under § 4b,* we simply cannot presume that Congress was aware of *Deaktor,* let alone silently approved of the private right of action it found.

(2) *References in Congress to Private Civil Suits*

The majority next relies upon a few scattered references to private civil actions in the course of hearings by House and Senate Committees with respect to the proposed 1974 amendments. None of these, however, reveal any approval or ratification of such rights. Indeed the evidence is overwhelming to the contrary.

The Senate

Not a single mention of private civil actions is to be found either in the Senate Committee Report with respect to the 1974 bill or on the Senate floor. The only references during the lengthy Senate hearings were those of Senator Clark, Professor Schotland of Georgetown University, and Ms. Judy Jackson, a representative of the Consumer Federation of America, with respect to a provision in a bill introduced by Senator Hart which would have expressly authorized private

civil suits for violations of the Act, S. 2837, § 5
and treble damages for willful violations, § 5
During the Senate hearings on various proposed
including the Hart bill, H.R. 13113 (the already p
House bill), S. 2485 (the Humphrey Bill) and S.
(the McGovern Bill), numerous witnesses specif
addressed the Hart Bill and vigorously urged tha
Committee adopt the private right of action pro
by it. Commodity Futures Commission Act: Hea
Before the Senate Committee on Agriculture
Forestry on S. 2485, S. 2578, S. 2837, and H.R. 1
supra. Professor Schotland stated that it was "ha
be emphatic enough in favor of [§ 505]" and
"private citizen action for self protection, with
judicial protections, is an enormous step toward he
assure vigorous regulatory action," *id.* at 737, 747
Judy Jackson noted that neither the Humphrey Bi
the House bill contained any provision for private
actions; *id.* at 369. Senator Clark, co-sponsor o
Hart Bill and a member of the Committee, *id.* at
spoke in support of private treble damages unde
bill. Professor Schotland warned about the nee
explicit language approving private rights of actio
stated that if Congress decided to adopt the repara
procedure and place "such virtually unpreced
responsibility and burden in this regulatory body,
should be explicit language in the statute that Fe
and State courts are still open if a complainant pr
to go to trial there," *id.* at 737, 747.

Congress rejected the bills. Under a princip
statutory construction expressly endorsed by
Supreme Court in *Amtrak, supra*, 414 U.S. at 4
decision ignored by the majority on this point, wh
here Congress has before it a specific propos

authorize private rights of action and after f
careful consideration declines to adopt that prop
action must not be treated as evidence of in
approve private rights of action, but rather as a
to preclude them. Moreover, its action certainly
the majority's argument that Congress intend
silentio to encourage the lower courts to cont
imply private rights of action.

It is suggested that Congress refused to ad
private right of action proposals because
opposition to treble damages. But this was
position articulated by any lawmakers, who ob
could have eliminated the treble part of the d
with the stroke of a pen and left standing the p
for compensatory damages. The Senate instead
reject the proposition that civil monetary dam
recoverable in any action other than a repa
proceeding.[15]

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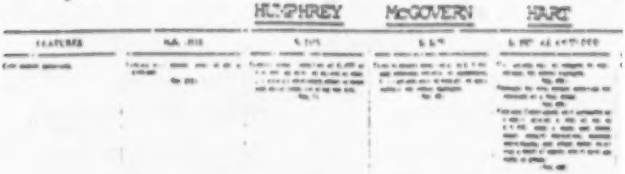
15 Indeed, the Senate had before it a chart comparing the
of the four bills under consideration, a chart that on
reference to the possibility that private damage suits wer
under the existing Act. The comparison chart reads in
part:



Commodity Futures Commission Act: Hearings before
Committee on Agriculture and Forestry on S. 2485, S. 257
and H.R. 13113, *supra*, at 194. Representative N
introduced a bill in the House, which like Senator McGo
expressly created an action for treble damages. H.R. 1
Cong., 1st Sess. § 17 (1973). In 1974, Rep. Smith in
similar bill which provided for the reparations procedure
eventually enacted as § 14, but deleted the provision
damages. H.R. 11195, 93d Cong., 2d Sess. (1974).

The House

Turning to the history of the legislat
House, the latter's Report with respect to
only two references to an implied pr
action, neither of which evince an intent
preserve that right. The Report stated
the 1968 amendments, which requ
markets to enforce their own rules a
designed to strengthen self-regulation
worked to weaken it because, as the C
informed,

> "[A]ttorneys to several boards of tr
> advising the boards of trade to redu
> exchange regulations designed t
> trading, since there is a growing b
> that failure to enforce the excha
> violation of the Act which will su
> private litigants." H.R. Rep. 93-975

The Report also stated that one of th
changing the law was

> "(2) Growing difficulties facing exch
> in self regulatory actions as a re
> plaintiffs seeking damages against
> activities of the markets. As examp
> are sued for actions taken in emerg
> even when the action has been taker
> or order of the CEA." *Id.* at 48.

Similar language was used by Chairma
he discussed the bill on the House floor,
41333 (Dec. 13, 1973).[16] Although it ma

---

16 Chairman Poage also stated on the House fl
Commodity Exchange Act was enacted, courts

an awareness by key personnel in Co
court decisions implying a cause of ac
Act, it hardly constitutes approval of th
the first place, the Supreme Court
reminded us that "even the contempor
of a single legislator who sponsors
controlling in analyzing legislative hist
Product Safety Commission v. GTE
supra, 48 U.S.L.W. at 4662. Second
merely recognizes a "growing body of o
ing private rights of action. Had Congr
approve or encourage that fledgeling
could and would have indicated as muc
than extol the virtues of private right
Report and Chairman Poage emphasize
created by private rights and poin
private suits against exchanges for a
them pursuant to order or request of th
CFTC.

I find no logical basis for reading thi
language criticizing private rights of ac
sional *approval* of such suits, whic
majority attempts to do. The majori
Congress was not criticizing private r
but merely the problems they created
ing private suits to continue, it sou
exchanges from reducing their rules in
civil liability by empowering the CFT
exchanges to adopt appropriate rul
speculative extrapolation is not suppor

---

remedy for individual litigants in the Commo
119 Cong. Rec. 41333 (Dec. 13, 1973). He, of co
right of action was not implied by a lower co

in the legislative history of the a
is refuted by the plain language

A more sensible interpretatio
ments is that Congress sought
comprehensive, cohesive and
regulation, H.R. Rep. 93-975, *su*
95-850, *supra,* at 10, 13. Believi
of action were inconsistent w
sufficiently increased the power
it, rather than private individual
for monitoring the futures tradi

---

17 Chairman Poage himself retreated
rights of action. In December, 1973,
the House he claimed that the threat o
why the exchanges had cut back on t
however, when he presented the bill
House for approval he stated "Regula
working as well as it should, and *part*
of present law the exchanges may b
regulatory activities when they should
todays markets." 120 Cong. Rec. 107
Private rights of action hardly consti
law." Thus, on the day in which C
focused on the Commodity Exchange A
House passed the bill—not one word
rights of action. It strains credulity to
that Congress somehow *relied* on pri
enacted the 1974 amendments.

18 The majority also relies on the curso
of action raised by one or two repres
industry in the House hearings, se
Trading Act of 1974: Hearings Befo
Agriculture on H.R. 11955, 93d Con
majority reads far too much in the "fa
to these scattered, vague and unfocuse
Supreme Court in *Ernst & Ernst v. H*
n.24 (1975):

> "Remarks of this kind made in t
> or hearings other than by persons r
> or the drafting of a bill are entitl
> *United States v. United Mine Wo*

Intent in Enacting Reparations Procedure and Other Remedies

Both the 1974 Senate and tively outline the enforcement t Act as it then stood, togeth remedies recommended and fina 1131, 93d Cong., 2d Sess. 11-2 975, *supra*, 33-53. There is not that the panoply of enforcemen Congress, including reparation tended to supplement privat majority here urges. Indeed, linked the reparations procedu action or mentioned them in th of course it is not defendants Congress intended an express what little direct evidence there the reparations procedure sug informal arbitration procedure exclusive. The House Report, f the reparations procedure is

> "intended as a separate supplement the informal contemplated of contract intent of the Committee which can be resolved i without a formal proce

(1947); *United States v. Wrightu* 125 (1942). This is especially so w legislative opponents who "[i]n t understandably tend to overstat *Packers*, 377 U.S. 58, 66 (196 *Calvert Distillers Corp.*, 341 U.S.

proceeding] through
of the contract mark
to resolve that matte
22.

"A customer repara
Commission will be a
of enactment for h
which arise from viol
those which result i
the customer. The c
jurisdiction to consid
have not been res
settlement procedur
market and registere
the bill." *Id.* at 3.

"The provision for t
customers accounts s
equal justice for those
in some way damag
commodity accounts."
(Letter to the Com
Agriculture.)

Congress has also explicit
procedure was created to
bias favoring the resolutic
arbitration," H.R. Rep. N
91 (1978), thus casting fu
the procedure was inte
rights of action. Equally r
that where futures as
procedures, thus relievin
duty to adopt similar pro

. . . would have their c
their claims through
reparations proceedings,
proceeding," S. Rep. N
present purposes it is sig
not include a private ri

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19 The few comments relie
Congress' intent to approv
vague and abstruse to enti
the majority overstates
statement that the act "se
120 Cong. Rec. 10737 (A
Chairman Poage used t
enforcement provisions, i
suits and levy civil penalt
these provisions were "new
Poage did not mean that
"supplementary" to *implie*
meant that the remedies
already contained in the A
supplement implied privat
directly, not through an a

Similarly, the majority p
of Senator Talmadge on t
while discussing the exclu
House bill, discussed more

> "In establishing this C
> give it exclusive jurisdi
> act. This will assure
> traders, customers, et c
> agency rulings. Howeve
> exempt persons in the fu
> or regulations such as t
> Futures Trading Commi
> bodies such as those of t
> or the Securities and
> securities.
>
> "The vesting in the
> administrative law judge
> criminal penalties is lik
> courts in any way. It is
> authority will somewhat
> the entire appeal proces
> the courts are expressly

Moreover, in the
right to recover u

The majority als
second paragraph i
action. That sent
Congress to the ex
clause not to appr
that the exclusive
interfere with fe
antitrust suits and
agencies or with s
law claims. Senato
tional provision a
stated in pertinent

> "In addition, t
> the Act would
> conferred on co
> remedial legisl
> Congress found
> jurisdiction of
> Congress was
> various state a
> abuses. Accordi
> clear that all p
> tions, as well a
> any provision
> prevent the cre
> the time betwe
> implementation
> Trading Commi
> learned, for exa
> currently unde
> investigations
> therefrom will
> Cong. Rec. 349

Though the major
rights of action,
interpretation. No
private rights of
exclusively on the
existing court acti

Thus, the second
1974, statement i
jurisdiction to the
courts would be li

action against suc
express limitation
of civil penalties
contract market: (
amount which wi
market's ability t
§ 6b of Act, 7 U

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that Congress dic
burden of hearing
antitrust and reg
hearing contract

20 Moreover, whe
actions in the fed
those who violate
expressly exempt
liability, thus indi
the enforcement c
markets and floor
of private suits, i
that contract ma
concerned about c
well have been c
history clearly c
markets not becau
but because it des
those markets in
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Contrary to the
difference betwee
of damages in a p
may well have in
some guidelines fc
likelihood of incor
often happens in

The House Rep
continue to have
uniform body of
ity futures tradin
respect to § 6d "
with respect to t
Commission." *Id.*

"The Committe
States as a ne

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So c
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notifica
that § 6
CFTC
Senate
Federal
commo
for tyin
practice
(July 1
63), the

analyzed, overhauled and amended the enforcement provisions of the Act refutes the majority's claim that it somehow or other affirmatively intended such rights to continue as a supplement to the battery of enforcement weapons provided by it. Had it desired or intended this, the logical and natural procedure would have been for it to say so. *SEC v. Sloan*, 436 U.S. 103, 122 (1977). No court has ever imposed on Congress the contrary duty, which the majority urges, of expressly stating that the remedies provided by it are exclusive.

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order to assure national uniformity, Congress permitted only the CTFC or the States, under limited circumstances, to bring suit, not private individuals.

In light of Congress' cautious and careful approach to *parens patriae* suits under § 6d, including the insulation of contract markets from those suits, it would be anomalous for Congress to have approved private suits against contract markets and floor brokers. It is unlikely that Congress would have required States to notify CFTC of any action brought under § 6d while at the same time permitting private suits to blossom all over the country without the CFTC's knowledge. *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 419, 420-21 n.13 (1974) ("anomalous for Congress to have centralized SEC suits [against the SIPC] for the apparent convenience of the SIPC while exposing the corporation to substantively identical suits by investors 'in any court, State or Federal' ").

The majority's reliance on the statement of Senator Leahy to the effect that contract markets were exempted from § 6d, in part because of the deterrent effect of private suits, 124 Cong. Rec. S16527 (Sept. 28, 1978), is misplaced. Since Congress was well aware by 1978 that the lower courts had begun to deny private rights of action under the Act, 124 Cong. Rec. S10537 (July 12, 1978) (Statement of Senator Huddleston), Senator Leahy's statement must be characterized as a hope and a prayer. Moreover, the explanation rings hollow since it would apply equally well to those traders subject to *parens patriae* suits who, under the view adopted by Senator Leahy at least, were also subject to private causes of action. Had Congress in fact believed that traders and contract markets were subject to private rights of action, it would have been far less likely to enact a *parens patriae* provision subjecting traders to suit by the States. Nor would it have been as concerned as it was about exempting contract markets from those suits.

Jurisdictional Provisions

The majority next contends that the "savings clause" incorporated into the jurisdictional provision, § 2 of the Act, 7 U.S.C. § 2 (§ 201 in the enacted bill), explicitly preserves the private right of action implied by the lower courts. Section 201 originated in H.R. 13113 and as passed by the House it read:

> "Provided, That the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade or contract market or on any other board of trade, exchange, or market; And provided further, That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States or restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with the laws of the United States."

During the Senate hearings Rep. Rodino, Chairman of the House Committee on the Judiciary, criticized the provision not on the grounds that it might eliminate private rights of action but rather because the provision might be interpreted as eliminating the jurisdiction of state courts over contract claims and the jurisdiction of federal courts over antitrust claims and suits seeking review of administrative hearings. His comments are

set forth in full in the margin.[21] He accordingly suggested the addition of a proviso to the effect that federal courts should not be ousted of their jurisdiction. As a result the following proviso was enacted:

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21 Chairman Rodino's statement reads in relevant part:

"This double proviso could be construed to raise a question of federal pre-emption of the commodity futures industry and, therefore, unnecessarily raises a question of federal-State relationships. Many of the millions of commodity futures contracts are presently enforceable in State courts under recognized commercial law and contract principles. This double proviso could, in effect, deprive State courts of their current jurisdiction. There does not appear to be any legislative intention or established need to achieve this pre-emption. . . .

"In addition, this double proviso could possibly be read as an attempt to oust even federal courts of jurisdiction. The first proviso confers 'exclusive jurisdiction' on the Commission for commodity transactions. Exceptions to this exclusive jurisdiction are carved out in the second proviso without, however, referring to federal district courts. That such a result was not intended in the House is readily apparent from the House action striking the original antitrust exempting provision: antitrust laws are to apply to commodity transactions and, of course, federal courts play an instrumental role in promoting as well as protecting the national policies expressed already in the antitrust laws. Arguably, too, if jurisdiction of federal courts were to be withdrawn also, the Commission decisions on commodity transactions would be non-reviewable by the judiciary raising, thereby, serious questions of administrative and constitutional law.

"If it appears advisable to retain rather than to delete the double proviso of Section 201(B) of H.R. 13113, it would seem reasonable to amend the second proviso appropriately to define the jurisdiction, including antitrust jurisdiction, of federal courts for commodity transactions. In this regard, the second proviso could be amended to provide:

"And provided further, that Nothing therein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities and on federal court. . . ." Commodity Futures Trading Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S 2578, S. 2837 and H.R. 13113, *supra*, at 259-60.

And provided further, That, except as herein
provided, nothing contained in this section sh
supersede or limit the jurisdiction at any
conferred on the Securities and Exchange Co
sion or other regulatory authorities under the
of the United States or of any State, or (ii) re
the Securities and Exchange Commission and
other authorities from carrying out their
and responsibilities in accordance with such
Nothing in this section shall supersede or lim
jurisdiction conferred on courts of the U
States or any State.

Other witnesses reiterated Chairman Rodino's
cisms without any reference to private rights of a
Mr. Keith Clearwater, Deputy Assistant Att
General, Dept. of Justice, for example, stated: "
are two problems with this language. It cou
interpreted to deprive the Federal Courts of
jurisdiction under the antitrust laws and to de
Federal and State courts of jurisdiction to en
contract and commercial law rights." Comm
Futures Commission Act: Hearings Before the S
Committee on Agriculture and Forestry on S.
S. 2578, S. 2837 and H.R. 13113, *supra,* at 663
Statements of James T. Halverson, Director of B
of Competition, Federal Trade Commission, *id.* at
68, and Statement of Glenn Willet Clark, Profes
Law, Drake University Law School, *id.* at 683-8

The majority's contention that the "savings cl
explicitly preserves a private right of action rests
on the comment of Senator Clark, while urgin
Senate to authorize private treble damage suits,
"Unfortunately, the House bill does not authorize

but section 201 of that bill may prohibit all actions. The staff has said that this was inadvertently and they hope it can be corrected Senate." *Id.* at 205.

This "passing reference" by a "single legislato slim reed on which to find congressional approv private right of action. *Consumer Product Commission v. GTE Sylvania, Inc., supra,* 48 U. at 4662; *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. at 31-32; *Chrysler Corp. v. Brown, supr* U.S. at 311; see *Ernst & Ernst v. Hochfelder,* 42 185, 204 n.24 (1976). Senator Clark's concern th House provision might prohibit "court actions" well have been intended to refer to actions arisi of commodity contract claims. Moreover, applyi principles of *Chrysler Corp.*, his statement m considered with the Reports of both Houses a statements of other witnesses and Congressmen which refute the majority's contention that the link between the jurisdictional provision of § 2(Congress' attitude toward private rights of acti

Given the reasons expressly advanced by Ch Rodino and given that no witness indicated th revision of § 201 was intended to preserve o affect any private rights of action in federal cou evidence is overwhelming that Congress simply t the task of correcting the problem noted by Ch Rodino and others and had no intention of appr private damage action. Had Congress inten preserve jurisdiction of the federal courts over suits it could easily have said so, as it did in § 6 it granted federal jurisdiction to hear CFTC-i injunctive suits, and in § 14(f) when it provid such jurisdiction to enforce judgments arising reparations proceedings.

The Act does not have any counte
jurisdictional provision of § 27 of th
Exchange Act of 1934, 15 U.S.C. §
affirmatively grants to federal courts exclu
tion of violations of the Act and of its re
authorizes civil suits to be brought in the
the defendant is found or resides. In a
"savings clause" here, which was directed
jurisdictional matters, could not pres
damage actions, since jurisdictional prov
create such rights, *Redington, supra,* 442
"The source of plaintiffs' rights must be fo
in the substantive provisions of the [Act
seek to enforce, not in the jurisdictional p
at 577 (citing cases).

The 1978 Amendments

Finally, although subsequent legislatio
limited weight in ascertaining Congres
enacting earlier laws, *Transamerica, supr*
at 248 n.13, the 1978 amendments are re
Congress did not provide expressly for a
of action against merchants and exchang
awareness that the lower courts had be
private rights of action under the Act,[22]

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22 The following cases, in addition to Judge MacM
this case, 470 F. Supp. 1256, have refused to imp
of action under the Commodity Exchange Act:
Witter & Co., 415 F. Supp. 535 (D. Neb. 1976
grounds, 571 F.2d 437 (8th Cir. 1978); *Consolo*
Weeks-Hemphill, Noyes, Inc., 436 F. Supp. 477
Bartels v. International Commodites Corp., 435
Conn. 1977); *Berman v. Bache Halsey Stuart, Shi*
Supp. 311 (S.D. Ohio 1979); *Alkan v. Rosenthal &*
Fut. L. Rep. Par. 20,797 (S.D. Ohio 1979); *Liang*
Supp. 891 (N.D. Ill. 1979); *Fischer v. Rosenthal &*
53 (N.D. Tex. 1979); *Stone v. Saxon and Windsor*
Comm. Fut. L. Rep. Par. 31,100 (N.D. Ill. 1980).

which Sen. Huddleston on the floor
deemed "unfortunate." 124 Cong. Rec. 1
1978). Instead, Congress proposed to
heavy burden on the reparations proced
the failure of lower courts to imply pri
action not by amending the Act to allow
as we would expect if it had approved o
but rather by eliminating the hearing r
reparations claims under $5,000. § 1
§ 18(b).

The failure of Congress to amend
particularly significant in light of its awa
time of the Supreme Court's recent but
adoption of somewhat stricter principles
implication of private causes of action.
414 U.S. 453 (1974); *Cort v. Ash*, 422 U
Securities Investor Protection Corp. v.
U.S. 412 (1975); *Blue Chip Stamps v.*
Stores, 421 U.S. 723 (1975); *Piper*
Industries, 430 U.S. 1 (1977); *Santa C*
Martinez, 436 U.S. 49 (1978).[23]

Second, Congress in 1978 received t
the states that they were uncertain, in l
adverse court decisions, about their al
parens patriae suits for violations of t
enforce their own contract and co
statutes. In sharp contrast to its 19
authorize private suits, Congress expres
the states to bring suits in federal co
violations of the Act or to obtain mon

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23 The majority responds that Congress' omissio
reasoning that Congress could not have been av
Supreme Court's retreat from a liberal view o
action). But, as the Court recognized in *Cannon*,
698, *Cort v. Ash* and other cases decided prior t
a stricter approach.

§ 6d, 7 U.S.C. § 13a-2, and exp
ability of the states to enforce
consumer fraud law. § 6d(5), 7 U.
apart from the fact that Congress'
contract markets and floor broker
§ 6d suggests a desire to insula
from private damage liability,[24] th
a clear indication that "Congress
private right of action when it
Transamerica, supra, 100 S. Ct. 2
Congress recognized that express
suits was necessary if a right unde
such litigation was to exist:

> "Section 12 specifically aut
> investigate or prosecute in a
> of the Act. . . . Any such ac
> in the proper Federal dist
> Commission is given the righ
> action as a party. *This is a n*
> *currently have no such expres*
> *Act."* H.R. Rep. No. 95-1181

This statement is strong evidence
intended to create a right of actio
so expressly, not by implication.[2

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24 See *supra* note 20.

25 Equally telling is the complete absenc
right of action in the exhaustive Se
Reports on the 1978 amendments, whic
private remedies available under the Ac
at 12-13; H.R. Rep. No. 95-1181, *supr*
Act, its history and its enforcement pro
private rights of action). This conspi
course, that Congress did not believe a
available.

The Theory that Congressional S
Amounts to Congressional Appro

Lacking any substantial suppo
legislative history of the Act t
atively approved private rights of
position boils down to the theor
have been aware generally of a fe
decisions implying a private righ
stood prior to 1974 and ther
approval of private rights unnece
mind that "[i]mplying a private c
basis of Congressional silence is a
at best," *Redington, supra,* 442
from congressional silence to c
must be made cautiously, if at
inappropriate to rely on the pre
the majority where, as here, Co
created a number of remedies whi
viewed as exclusive and where, if
adopt a prior judicial interpreta
additional remedy, it would have
body of earlier lower federal
provides a wholly inadequate bas
relevance, weight, period of existe
such an inference.

In *T.I.M.E. v. United States, su*
Court expressly rejected the posi
majority here. There a shipper of
it had a private cause of action un
Act to recover unreasonable rates
in violation of the Act. After rej
that the Act granted a private ri
because, as here, Congress specifi
a proposed cause of action, the Co

that the Act must be read
common-law or judicially

"The Government i
cases in addition to
years since passage o
which courts have a
issue of reasonablenes
was litigable, and in n
question given othe
attention. Under the
before us cannot fairl
long-standing interpre

"We are told that C
that the Commission
common-law action f
rates paid to a motor
Commission of the
would lie, and that
derogation of this vie
acceptance of it. But i
Commission's views ir
cated to committees
connection with a req
legislation which wou
cause of action under
the Commission the
tions, and each time th
[W]e do not think that
to grant a new author
permissibly be draw
authority previously
confirmed." 359 U.S.

The few decisions relie
consistent with the for
exceptionally long period
and not, as here, an inte
court, the Seventh Circui
old. In *Blue Chip Stamps*
421 U.S. at 733, the Co
acceptance by the lower
§10(b) limiting the caus
securities, coupled with th
that interpretation, despit
Commission's repeated ur
favor of acceptance" of th
supra, 441 U.S. 677, the
action under Title IX of t
1972, noted that Congres
under Title IX similar to
and found that Congress
had implied a right of ac
VI. The Court, however, s
on the presumption used
private right of action mu
expressly repealed by Co
decision on what it
affirmative intent to creat
at 699.

Similarly in *SEC v. Slo*
Court rejected the argum
presumed to have approve
tive construction of a s
enactment of the statute
interpretation and the fac
the relevant Senate C
understood and approved

noted that "we a
general congressio
construction based
in the thousands
That language i
additional indicatio
awareness, is sim
presumption in a
Court concluded th
the prior interpret
said so. This princ
present case.

The cases cited
contrary. In *Lorilla*
Court found that
Discrimination Em
porating a number
Standards Act (FL
construction of tho
because Congress e
FLSA provisions
willingness to depa
which it disagreed,
the changes made
intended to incorp
interpretations of
from the situatio
references to the p
and far between i
Congress dos not
interpretation.

Reliance on *Geor*
(1978), is similar
congressional acqui

decision to be pe
decision was rep
Congress. Indeed,
approximately 73
in the Senate, *id.*

All of these a
inference as to co
to draw in this c
placed on a few s
references in thou
rather than upon
identified Suprem
Georgia. Unlike th
§ 10(b), with whi
Superintendent of
find a brief line of
are relevant to th
only one year bef
knowledge of whi
This hardly con
recognized prior
invoke the dubi
majority here. The
amended the Sec

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26 The other cas
distinguishable. I
rights of action a
to go slow in in
approve a private
Second, the case
interpretation is
year old history o
115 F.2d 709 (2d
Electric Storage
where, unlike the
references in the
Bennett v. Panan

opinion, *su*
decisions (e
Chip Stamp
quite differ
court decisi
had knowle
of action ba
are invoked
Lastly, si
1974 decisi
theory of t
unreasonabl
Supreme Co
by tacitly g
Co. v. Unite
v. Sloan, s
interpretati
statutory a
when thoro
Supreme C
signaled a s
tion of priv
notice that t
private righ
settled.
In the la
speculation
reasonable
issue was sq
failed to ap
indicate in a
implied one.
its refusal
rights of ac

(Powell, J., dissenting). Under these circumstances, absent some expression of approval by Congress, formal or informal, I believe we should not imply an intent on its part to create an implied right of action. Under these circumstances, creation of a private right rests with Congress, not the judiciary.

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 2375 (LFM), 76 Civ. 2554 (LFM),
76 Civ. 2571 (LFM), 76 Civ. 2594 (LFM)

NATIONAL SUPER SPUDS, INC. et al.,

Plaintiffs,

—against—

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

---

76 Civ. 2648 (LFM)

INCOMCO,

Plaintiff,

—against

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

---

76 Civ. 3210 (LFM)

HOWARD BERENSON,

Plaintiff,

—against—

JOHN RICHARD SIMPLOT et al.,

Defendants.

---

76 Civ. 4350 (LFM)

NEIL LEIST et al.,

Plaintiffs,

—against—

JOHN RICHARD SIMPLOT et al.,

Defendants.

---

76 Civ. 5200 (LFM)

DEXTER RICHARDS,

Plaintiff,

—against—

NEW YORK MERCANTILE EXCHANGE et al.,

Defendants.

APPEARANCES:

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—and—

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MacMahon, *District Judge.*

Defendants, the New York Mercantile Exchang
"Exchange"), Richard Levine ("Levine"), Howard
("Gabler"), Alfred Pennisi ("Pennisi"), Clayton F
age Co. of St. Louis, Inc. ("Clayton"), Heinold Cor
ties, Inc. ("Heinold") and Thomson & McKinnon A
closs Kohlmeyer, Inc. ("Thomson"), move under
12(c), Fed.R.Civ.P., for judgment on the pleadin
in the alternative, under Rule 56(b), Fed.R.Civ.
partial summary judgment dismissing all or part
complaints against them in these related actions.[1]

[1] The Exchange moves in the following actions: *Nationa
Spuds, Inc.* v. *New York Mercantile Exchange*, 76 Civ. 2
Civ. 2554, 76 Civ. 2571, 76 Civ. 2594 (the "consolidated c

all parties have submitted factual materia
pleadings, we treat the motions as motion
summary judgment.

These actions arise out of the much publ
in May 1976 of Maine potato futures contra
sellers of almost 1,000 contracts failed to de
imately 50,000,000 pounds of potatoes, res
largest default in the history of commodities
ing in this country. The primary claim in th
that the default was caused by certain defe
manipulation.

In order to understand these motions, a
standing of the commodities futures industr
A commodity future is a contract for the fu
of a certain commodity. Except for price, all
the contracts for a given commodity traded o
are standardized and, thus, the contracts are
actual trading of futures is done by future
merchants and floor brokers, both of whom
istered with the Commodities Futures Tradin

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tions"); *Incomco* v. *New York Mercantile Exchang*
and *Leist* v. *Simplot*, 76 Civ. 4350.

Levine, Gabler and Pennisi move in *Leist* v. *S*
4350.

Clayton moves in the consolidated class actions
Simplot, 76 Civ. 4350.

Heinold and Thomson move in the consolidated
Berenson v. *Simplot*, 76 Civ. 3210, and in *Leist* v.
4350.

The motions of the Exchange, Levine, Clayto
Thomson in *Richards* v. *New York Mercantile Ex*
5200, are denied as moot because this action was di
these motions were filed.

The motions of the Exchange and Clayton in *B*
plot, 76 Civ. 3210, are also denied as moot because
been discontinued as to the Exchange and Clayton.

[3] See N.Y. Times, May 26, 1976, at 1, col. 1.

(the "CFTC").[3] Additionally, trading may
on exchanges which have complied with ce
requirements and have been designed as
kets" by the CFTC.[4]

A seller of a futures contract is, in the l
trade, in a "short" position, that is, he is o
liver the commodity at a future date in
right to receive the purchase price. Convers
a futures contract is said to be in a "long"
is, he is obligated to pay the purchase pric
the right to receive the commodity. As a pr
however, physical delivery of the commodi
only a small fraction of the futures contr
the nation's exchanges. Most of the trade
speculators who have no intention of delive
ing the actual commodity. As the last day
particular contract approaches, a speculator
sition (a seller) will cover his obligation
buying a contract. Similarly, a speculator
tion (a buyer) will cover his obligation to p
contract.[5]

Plaintiffs, traders and a dealer in potato
holding long positions in May 1976 Maine
contracts. They allege that Clayton, Heinold
futures commission merchants, conspired v
their customers to manipulate and depress t
May contract by selling an illegally large n
contracts, thereby causing plaintiffs to sell
and potatoes at an artificially depressed p

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[3] 7 U.S.C. §§ 6d, 6e, 6f.

[4] 7 U.S.C. §§ 6, 7.

[5] The commodities futures industry is describe
in S. Angrist, Sensible Speculating in Commod
S. Kroll & I. Shishko, Commodity Futures Mark

Plaintiffs contend that the action
and Thomson violated the Commo
(the "Act"), various regulations pro
and Sections 1 and 2 of the Sherma
contend that the Exchange, a design
and its officers, Levine, Gabler and
them for failure to take steps to p
price manipulation by the other def
Exchange conspired with the other d
late the price.

Specifically, plaintiffs allege that
officers failed to report and concealed
and the regulations promulgated the
change and its officers violated the Ac
its own rules, the Act and the CFT
that the Exchange violated Sections 1
Act.

IMPLIED RIGHT OF A

All moving defendants contend tha
partial summary judgment because
right of action against them under
such a right of action existed prior

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[6] 7 U.S.C. § 1 et seq.

[7] Plaintiffs also allege violations of th
cause the obligation to obey these rules
regulations, we consider these claims as
CFTC's regulations.

[8] 15 U.S.C. §§ 1, 2.

[9] *E.g., Deaktor* v. *L.D. Schreiber & Co.*,
rev'd on other grounds sub nom. Chicago
Deaktor, 414 U.S. 113 (1973); *Goodman*
F. Supp. 440 (N.D. Ill. 1967).

year, the Act was amended exten
tion before us is whether the priv
survived the 1974 amendments to th

Although a number of other di
sidered this question, there is no
answer.[11] This difference of opini
of the question to the future course
us to resolve the question ourselves

Under *Cort* v. *Ash*,[12] four factors
mining whether a private right of
under a federal statute which does
for one:

> "First, is the plaintiff 'one o
> *especial* benefit the statute wa

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[10] Commodity Futures Trading Comm
L. No. 93-463, 88 Stat. 1389 (codified at
Act was further amended in 1978. Fut
Pub. L. No. 95-405, 92 Stat. 865 (codifie

[11] Nine cases have stated that a priv
under the Act: *R.J. Hereley & Son* v.
L. Rep. (CCH) ¶ 20,773 (N.D. Ill. 1979)
C 2297 (N.D. Ill. Feb. 2, 1979); *Grav*
& Smith, Inc., Comm. Fut. L. Rep. (
1978); *Berenson* v. *Madda Trading Co.*
30, 1978); *Hoffmayer* v. *Dean Witter &*
(CCH) ¶ 20,694 (N.D. Cal. 1978); *Kel*
346 (W.D. Mich. 1977); *Bache Halsey*
F. Supp. 1231 (D.D.C. 1977); *Shears*
Lumber Merchants, Inc., 423 F. Supp
Milani v. *Conticommodity Serv., Inc.*, 46
1976).

Five cases have stated that no priv
under the Act: *Alkan* v. *Rosenthal &*
(CCH) ¶ 20,797 (S.D. Ohio 1979); *Ber*
art, Shields, Inc., Comm. Fut. L. Rep. (
1979); *Bartels* v. *International Commo*
865 (D. Conn. 1977); *Consolo* v. *Horn*
Noyes, Inc., 436 F. Supp. 447 (D. Ohi
Witter & Co., 415 F. Supp. 535 (D.
grounds, 571 F.2d 437 (8th Cir. 1978).

[12] 422 U.S. 66 (1975).

> does the statute create a
> plaintiff? Second, is th
> tive intent, explicit or i
> a remedy or to deny on
> with the underlying pur
> to imply such a remedy
> finally, is the cause of act
> to state law, in an area
> States, so that it would
> cause of action based so

There can be no question t
commodities market and a
the class "for whose especi
acted." As Senator Dole st
the 1974 amendments to the
manipulation of markets and
desires to participate in futu
tionally, the Act itself state
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Thus, we find that the fir
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The second element of the
is more troublesome. The
established an administrat
"[a]ny person complaining
vision of this chapter or a
thereunder by any person w

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[13] *Id.* at 78 (citations omitted

[14] 120 Cong. Rec.-Senate 3046
accord 120 Cong. Rec.-Senate
Clark). See also *Ames* v. *Merri*
Inc., 567 F.2d 1174, 1179 (2d C

[15] 7 U.S.C. § 5.

be registered under . . . t
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reparations. Judgments re
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The 1974 amendments also
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The CFTC may suspend o
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the Attorney General, at t
thorized to bring an actio
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a restraining order, an inj
to compel compliance wit
thereunder.[22]

We believe that under t
est exclusio alterius," [23] the

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[16] 7 U.S.C. § 18(a).

[17] 7 U.S.C. § 18(g).

[18] 7 U.S.C. § 18(f).

[19] 7 U.S.C. §§ 7b, 9.

[20] 7 U.S.C. § 13a.

[21] 7 U.S.C. §§ 9, 13a.

[22] 7 U.S.C. § 13a-1. The 197
provision by which a state ma
behalf of its citizens. 7 U.S.C.

[23] Expression of one thing
Securities Investor Protection
(1975); *National R.R. Passen*
Passengers, 414 U.S. 453, 458
& Co., 592 F.2d 617, 629-30 (
cert. granted, 47 U.S.L.W. 336

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[24] Hearings on S. 24
the Senate Committee
Sess. pt. 3, 737, 746 (19

[25] S. 2837, 93d Cong
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[26] *Piper* v. *Chris-Cr*
Cort v. *Ash*, *supra*, 4
U.S. 426, 432 (1964);
tion from Federal Stat
53, 69 (1975).

[27] 7 U.S.C. § 13a.

the CFTC is requir
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Additionally, the
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Thus, we conclud
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Thus, our applic
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[28] *Id.*

[29] See text accompa

[30] See *e.g. Smith* v.
Fairchild, Arabatzis
(CCH) ¶ 20,706 at 22

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[33] 15 U.S.C.

[33] The SEC
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[34] 15 U.S.C.

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critical importance when it implied private rights of action under that Act.[35]

Plaintiffs also argue that the CFTC interprets the Act as allowing private rights of action[36] and that the CFTC's interpretation is entitled to "'great deference.'"[37] However, as the Supreme Court has recently stated, the administrative deference rule is not applicable where the "narrow legal issue is one particularly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants."[38]

Finally, we note that the Supreme Court's recent decision in *Cannon* v. *University of Chicago*[39] is readily distinguishable from this case. In *Cannon*, the Supreme Court implied a private right of action for a victim of alleged sex discrimination under Title IX of the Education Amendments of 1972,[40] despite the existence of an administrative procedure to enforce those amendments. However, the only administrative remedy under Title IX is the termination of federal grants to educational institutions which discriminate on the basis of sex. Thus, the Supreme Court found that Title IX provided no private administrative remedy to victims of sex discrimination.[41] In contrast,

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[35] *Securities Investor Protection Corp.* v. *Barbour*, *supra*, 421 U.S. at 424; *J.I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 430-31.

[36] Amicus Curiae Brief of the Commodities Futures Trading Commission submitted in *Smith* v. *Grover*, *supra*.

[37] *United States* v. *Consumer Life Ins. Co.*, 430 U.S. 725, 752 (1977) (citations omitted).

[38] *Piper* v. *Chris-Craft Indus., Inc.*, *supra*, 430 U.S. at 41 n.27.

[39] 47 U.S.L.W. 4549 (U.S. May 14, 1979) (No. 77-926).

[40] 20 U.S.C. §§ 1681-1686.

[41] See 47 U.S.L.W. at 4556.

the reparations procedure available under the Commodities Exchange Act provides a remedy directly for the benefit of private parties injured by violations. Thus, unlike *Cannon,* the implication of a right of action here is not necessary to provide a plenary remedy to the intended beneficiaries of the Act.

Cannon is also distinguishable for a second reason. In *Cannon,* the Supreme Court noted that Title IX was enacted in 1972 when the Court had been rather liberal in finding implied rights of action. The Court found that Congress expected Title IX to be interpreted in accordance with that liberal view.[42] The Commodities Exchange Act, on the other hand, was reconsidered by Congress as recently as last year when the Supreme Court had retreated from its liberal view toward implied rights of action.[43] Yet, in enacting the 1978 amendments to the Act, Congress again failed to add a section expressly providing for a private right of action despite knowledge that a number of district courts had held that the private right of action previously implied did not survive the 1974 amendments.[44] *Cannon* teaches that the failure of Congress to provide for a private right of action must be viewed in light of the judicial attitude toward such rights at the time of enactment. In light of that teaching, the failure of Congress to provide for a private right of action in the 1978 amendments evidences an intent to deny such a right.

Thus, we conclude that there is no private right of action against futures commission merchants and contract markets under the Act. Since there is no private right of action under the Act, it necessarily follows that there is no private

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[42] *Id.* at 4554.

[43] *Id.*

[44] 124 Cong. Rec.-Senate 10537 (remarks of Sen. Huddleston).

right of action under the regulations promulgated pursuant to the Act.[45]

ANTITRUST CLAIMS

Clayton and Heinold also move for summary judgment on the antitrust claims, asserting that there is no genuine issue of fact that they did not intend to manipulate the price of May 1976 Maine potato futures contracts.

A party seeking summary judgment bears the burden of demonstrating the absence of any genuine issue of fact,[46] even when the motion is unopposed.[47] Clayton and Heinold have submitted excerpts of deposition testimony given by certain of their employees. Although this testimony does tend to show that Clayton and Heinold lacked the intent required for a violation of the Sherman Act, it is neither conclusive nor sufficiently clear to allow us to conclude that there is no genuine issue of fact. Clayton's employee, Delbridge, admitted that Clayton took no steps to investigate its clients' ability to deliver despite their large short position, and Heinold's vice-president, Klopfenstein, admitted that Heinold did not take the steps that it normally would have taken to ensure that its short customers could deliver. Given the elusive nature of intent and its significance to an antitrust violation,[48] we cannot say that there is no issue of fact regarding Clayton's and Heinold's knowledge and intent.[49]

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[45] *Crane Co.* v. *American Standard, Inc.*, No. 77-7517, slip op. at 2019 n.11 (2d Cir. Apr. 4, 1979).

[46] *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

[47] *Id.* at 160.

[48] See *United States* v. *United States Gypsum Co.*, 98 S. Ct. 2864 (1978).

[49] See *SEC* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978) ("[S]ummary judgment is likely to be inappropriate when the issues concern intent.").

Accordingly:

1. There being no just reason for delay, the Clerk court is directed, pursuant to Rule 54(b), Fed.R.Civ. enter final judgment:

A. In favor of the Exchange on its motion partial summary judgment on the sixth claim first amended consolidated class action compla *National Super Spuds, Inc.* v. *New York Merc Exchange*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 257 76 Civ. 2594; the first and fourth claims of the plaint in *Incomco* v. *New York Mercantile Exchan* Civ. 2648; and the fourth claim of the compla *Leist* v. *Simplot*, 76 Civ. 4350;

B. In favor of Levine, Gabler and Pennisi on motion for summary judgment on the fourth cla the complaint in *Leist* v. *Simplot*, 76 Civ. 4350;

C. In favor of Clayton on its motions for p summary judgment on the fourth claim of th amended consolidated class action complaint i *tional Super Spuds, Inc.* v. *New York Mercanti change*, 76 Civ. 2375, 76 Civ. 2554, 76 Civ. 2571 a Civ. 2594; and the first claim of the complaint in v. *Simplot*, 76 Civ. 4350;

D. In favor of Heinold and Thomson on thei tions for partial summary judgment on the claim of the first amended consolidated class complaint in *National Super Spuds, Inc.* v. *New Mercantile Exchange*, 76 Civ. 2375, 76 Civ. 2554, 7 2571 and 76 Civ. 2594; the first claim of the com in *Leist* v. *Simplot*, 76 Civ. 4350; and the second of the complaint in *Berenson* v. *Simplot*, 76 Civ. to the extent that it asserts a claim under the Act

2. Clayton's and Heinold's motions for summar
ment in their favor on all other claims against t
denied in all respects.

So ordered.

Dated: New York, N.Y.
May 29, 1979

/s/ Lloyd F. MacM
Lloyd F. MacM
United States Distric

Judgment of the Court of Appe

UNITED STATES COURT OF API

For the Second Circuit

At a stated Term of the United States Cou
for the Second Circuit, held at the United
house in the City of New York, on the eighth
one thousand nine hundred and eighty.

79-7402, 79-7464, 79-7482

Neil Leist, Philip Smith and Inc

Plaintif

—v.—

John Richard Simplot, J.R. Simplot &

Clayton Brokerage Co. of St. Loui
Heinold Commodities Inc., *et a*

Defenda

Present:

Hon. Henry J. Friendly,
Hon. Walter R. Mansfield,
Hon. Amalya L. Kearse,

C

Appeal from the United States District
Southern District of New York.

This cause came on to be heard on the
record from the United States District
Southern District of New York, and was arg

On Consideration Whereof, it is now h
adjudged, and decreed that the order of said
be and it hereby is reversed in accordance w
of this court with costs to be taxed against th

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By: /s/ A
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ORDER DENYING RE

UNITED STATES COURT

SECOND CIRCUI

At a Stated Term of the United States
for the Second Circuit, held at the Unite
the City of New York, on the ninth day
sand nine hundred and eighty.

PRESENT:

HON. HENRY J. FRIEN
HON. WALTER R. MAN
HON. AMALYA L. KEA

79-7402

NEIL LEIST, PHILIP SMITH a

—against—

JOHN RICHARD SIMPLO

CLAYTON BROKERAGE CO. OF ST. LOU
MODITIES, INC., THOMSON & MC
KOHLMEYER, INC., NEW YORK M
RICHARD B. LEVINE, HOWARD GA

79-7464

INCOMCO,

—against—

THE NEW YORK MERCANTILE EXCH
PRODUCE CO., & HAROI

THE NEW YORK MERCANTI

79-7482

NATIONAL SUPER SPUDS, INC., WILLI
LARD C. SHINER, EUGENE P. WE
RAYMOND ROTHBERG, ARTHUR S.
BRINEK, CAPGAIN HOLDINGS, INC
individually and on behalf of all p

—against—

NEW YORK MERCANTILE E

HEINOLD COMMODITIES, INC., and T
AUCHINCLOSS, KOHLME

A petition for a rehearing having be
for the defendant-appellee Heinold Co
Upon consideration thereof, it is
Ordered that said petition be and he

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ORDER DENYING R

UNITED STATES C

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At a Stated Term of the Unit
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CLAYTON BROKERAGE CO. OF
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KOHLMEYER, INC., NEW
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NEW YORK MERCA

HEINOLD COMMODITIES, INC
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A petition for rehearing cont
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Upon consideration thereof,
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SEC. 1. All legislati
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Provisions

Section 4a, 49 Stat

SEC. 4a. (1) Exces
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Section 4a

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were held by, or the trading were done by, a single person. Nothing in this section shall be construed to prohibit the commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months, or different trading limits for buying and selling operations, or different limits for the purposes of paragraphs (2)(A) and (B) of this section, or from exempting transactions normally known to the trade as "spreads" or "straddles" or "arbitrage" or from fixing limits applying to such transactions or positions different from limits fixed for other transactions or positions. The word "arbitrage" in domestic markets shall be defined to mean the same as a "spread" or "straddle". The Commission is authorized to define the term "international arbitrage".

(2) The commission shall, in such order, fix a reasonable time (not to exceed ten days) after the order's promulgation; after which, and until such order is suspended, modified, or revoked, it shall be unlawful for any person—

(A) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale of such commodity for future delivery on or subject to the rules of the contract market or markets to which the order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the commission in such order for or with respect to such commodity; or

(B) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the commission for or with respect to such commodity: *Provided,* That such position limit shall not apply to a position acquired in good faith prior to the effective date of such order.

(3) No order issued under paragraph (1) of this section shall apply to transactions or positions which are shown to be bona fide hedging transactions or positions as such terms shall be defined by the Commission within one hundred and eighty days after the

effective date of the Commodity Futures Trading Commission Act of 1974 by order consistent with the purposes of this chapter.

(4) This section shall apply to a person that is registered as a futures commission merchant or as floor broker under authority of this chapter only to the extent that transactions made by such person are made on behalf of or for the account or benefit of such person. This section shall not apply to transactions made by, or on behalf of, or at the direction of, the United States, or a duly authorized agency thereof.

Section 4b, 49 Stat. 1493-94 (1936)

SEC. 4b. It shall be unlawful for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of (1) any contract of sale of any commodity in interstate commerce, or (2) any contract of sale of any commodity for future delivery made, or to be made, on or subject to the rules of any contract market for or on behalf of any person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such person;

(B) willfully to make or cause to be made to such person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

Nothing in this section or in any other section of this chapter shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of a commodity for future delivery in the same month, from executing such buying and selling orders at the market price: *Provided,* That any such execution shall take place on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange: *And provided further,* That such transactions shall be made in accordance with such rules and regulations as the Commission may promulgate regarding the manner of the execution of such transactions.

Section 4b, 7 U.S.C. § 6b

§ 6b. Contracts designed to defraud or mislead; bucketing orders; buying and selling orders for commodities

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such com-

modity or the products or by-products thereof, or (b) deterr
the price basis of any transaction in interstate commerce i
commodity, or (c) delivering any such commodity sold, sh
or received in interstate commerce for the fulfillment the

(A) to cheat or defraud or attempt to cheat or d
such other person;

(B) willfully to make or cause to be made to such
person any false report or statement thereof, or willf
enter or cause to be entered for such person any false
thereof;

(C) willfully to deceive or attempt to deceive such
person by any means whatsoever in regard to any such
or contract or the disposition or execution of any such
or contract, or in regard to any act of agency performe
respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by
against the order or orders of any other person, or wi
and knowingly and without the prior consent of such p
to become the buyer in respect to any selling order o
person, or become the seller in respect to any buying or
such person.

Nothing in this section or in any other section of this ch
shall be construed to prevent a futures commission mercha
floor broker who shall have in hand, simultaneously, buyin
selling orders at the market for different principals for
quantity of a commodity for future delivery in the same m
from executing such buying and selling orders at the m
price: *Provided,* That any such execution shall take place
floor of the exchange where such orders are to be executed a
lic outcry across the ring and shall be duly reported, recorde
cleared in the same manner as other orders executed on su
change: *And provided further,* That such transactions sh
made in accordance with such rules and regulations as the
mission may promulgate regarding the manner of the exe
of such transactions.

Section 5a(11), 7 U.S.C. § 7a(11)

§ 7a. Duties of contract markets

Each contract market shall—

Settlement of customers' claims and grievances

(11) provide a fair and equitable procedure through a
tion or otherwise (such as by delegation to a registered
association having rules providing for such procedures)
settlement of customers' claims and grievances agair
member or employee thereof: *Provided,* That (i) the use
procedure by a customer shall be voluntary, (ii) the pr
shall not be applicable to any claim in excess of $15,000,
procedure shall not result in any compulsory payment ex
agreed upon between the parties, and (iv) the term "custo
used in this paragraph shall not include a futures com
merchant or a floor broker,

Section 6(b), 7 U.S.C. § 9

**§ 9. Exclusion of persons from privilege of "contract m
procedure for exclusion; penalties; review by c
appeals**

If the Commission has reason to believe that any perso
than a contract market) is manipulating or attempting to
ulate or has manipulated or attempted to manipulate the
price of any commodity, in interstate commerce, or fo
delivery on or subject to the rules of any contract market
willfully made any false or misleading statement of a
fact in any registration application or any report filed
Commission under this chapter, or willfully omitted to
any such application or report any material fact which is
to be stated therein, or otherwise is violating or has violate
the provisions of this chapter or of the rules, regulations, c
of the Commission thereunder, it may serve upon such
complaint stating its charges in that respect, which co
shall have attached or shall contain therein a notice of

specifying a day and place not less than three da
vice thereof, requiring such person to show cau
should not be made prohibiting it from trading
the rules of any contract market, and directing
markets refuse all trading privileges to such pers
notice of the Commission, and to show cause why
of such person, if registered as futures commiss
any person associated therewith as described in s
title, commodity trading advisor, commodity poo
floor broker hereunder, should not be suspended
hearing may be held in Washington, District of C
where, before the Commission, or before an Adm
Judge designated by the Commission, which Adm
Judge shall cause all evidence to be reduced to w
with transmit the same to the Commission. Up
ceived, the Commission may prohibit such person
or subject to the rules of any contract market and
tract markets to refuse such person all trading p
for such period as may be specified in the order, an
is registered as futures commission merchant or
ciated therewith as described in section 6k of this
trading advisor, commodity pool operator, or as fl
under, may suspend, for a period not to exceed si
voke, the registration of such person, and may as
a civil penalty of not more than $100,000 for eac
Notice of such order shall be sent forthwith by re
by certified mail or delivered to the offending pe
governing boards of said contract markets. After
the order by the Commission, the person against
may obtain a review of such order or such other e
to the court may seem just by filing in the United
appeals of the circuit in which the petitioner is
written petition, within fifteen days after the noti
is given to the offending person praying that the o
mission be set aside. A copy of such petition sh

transmitted by the clerk of the court to the Comr
upon the Commission shall file in the court the r
made, as provided in section 2112 of Title 28. U
the petition the court shall have jurisdiction to a
or modify the order of the Commission, and th
Commission as to the facts, if supported by t
dence, shall in like manner be conclusive.

Section 8(a), 7 U.S.C. § 12(a)

§ 12(a). Investigations respecting operations o and others subject to this chapter; sults; restrictions

(a) For the efficient execution of the provisio
and in order to provide information for the use
Commission may make such investigations as it
to ascertain the facts regarding the operations
and other persons subject to the provisions of
Commission may publish from time to time t
such investigation and such general statistical i
ered therefrom as it deems of interest to the
That except as otherwise specifically authorize
the Commission may not publish data and infor
separately disclose the business transactions or
of any person and trade secrets or names of cu

Section 8c, 7 U.S.C. § 12c

§ 12c. Disciplinary actions; notice; revie Commission

(1)(A) Any exchange or the Commission if
to act, may suspend, expel, or otherwise discipli
is a member of that exchange, or deny any perso
change. Any such action shall be taken solely i
the rules of that exchange.

(B) Any suspension, expulsion, discip
procedure established by an exchange rul
ten notice to the Commission and to the p
expelled, or disciplined, or denied access, v
includes the reasons for the exchange acti
ner the Commission prescribes. An exch
its findings and the reasons for the exch
proceeding, including the action taken
but shall not disclose the evidence theref
who is suspended, expelled, or disciplined,
the Commission.

(2) The Commission may, in its discr
with such standards and procedures as
review any decision by an exchange wher
ed, expelled, otherwise disciplined, or d
change. In addition, the Commission ma
upon application of any person who is ac
other exchange action, review such actio

(3) The Commission may affirm, mod
any exchange decision it reviews pursuant
section, after a determination on the reco
the exchange was in accordance with the
Subject to judicial review, any order of t
pursuant to paragraph (2) of this secti
change in its further treatment of the ma

(4) The Commission, in its discretion,
action taken pursuant to paragraph (1)
review thereof.

Section 9, 42 Stat. 1003 (1922)

SEC. 9. Any person who shall violate th
of this Act, or who shall fail to evidence
in said section by a record in writing as t

shall knowingly or carelessly deliver fo
mails or in interstate commerce by tele
or other means of communication fals
ingly inaccurate reports concerning cr
or conditions that affect or tend to affe
terstate commerce, shall be deemed gui
upon conviction thereof, be fined not mo
oned for not more than one year, or bo
of prosecution.

Section 9, 49 Stat. 1501 (1936)

SEC. 9. Any person who shall violat
4, section 4a, section 4b, section 4c, sec
4h, or section 4i of this Act, or who shal
manipulate the price of any commodit
or for future delivery on or subject to
trade, or who shall corner or attempt
modity, or who shall fail to evidence a
section 4 of this Act by a record in writ
who shall knowingly or carelessly deliv
for transmission through the mails or i
telegraph, telephone, wireless, or other
false or misleading or knowingly inac
crop or market information or conditi
affect the price of grain in interstate co
guilty of a misdemeanor, and, upon co
not more than $10,000 or imprisonme
year, or both, together with the costs o

Section 9, 82 Stat. 33–34 (1968)

SEC. 9. (a) It shall be a felony punis
than $10,000 or imprisonment for not
both, together with the costs of prosecu
mission merchant, or any employee or a
steal, purloin, or with criminal intent co

use of another, any money, sec
in excess of $100, which was r
chant to margin, guarantee, or
any customer of such commiss
customer as the result of suc
'value' as used in this paragraph
or cost price, either wholesale

(b) It shall be a felony puni
$10,000 or imprisonment for n
together with the costs of pros
ulate or attempt to manipulate
terstate commerce, or for future
of any contract market, or to co
commodity, or knowingly to de
transmission through the mails
graph, telephone, wireless, or
false or misleading or knowing
crop or market information or
affect the price of any commod

(c) Except as provided in pa
tion, it shall be a misdemeanor
than $10,000 or imprisonment
both, together with the costs
violate the provisions of section
4c, section 4d, section 4e, sectio
fail to evidence any contract me
a record in writing as therein r

Section 9(b), 7 U.S.C. § 13(b

**§ 13(b). Price manipulation; c
semination of false
ing price of commo**

(b) It shall be a felony puni
$500,000 or imprisonment for

together with the costs of pros
ulate or attempt to manipulate
terstate commerce, or for futur
of any contract market, or to
such commodity, or knowingly
for transmission through the n
telegraph, telephone, wireless,
false or misleading or knowin
crop or market information o
affect the price of any comm
knowingly to violate the provisi
6c(e), 6h, 6o(1), or 23 of this ti
or misleading statement of a m
plication or report filed with
omit in any application or
required to be stated therein.
the case of any violation descri
person who is an individual,
$100,000, together with the co

Section 9(c), 7 U.S.C. §13(c

§ 13(c). Other violations; mis

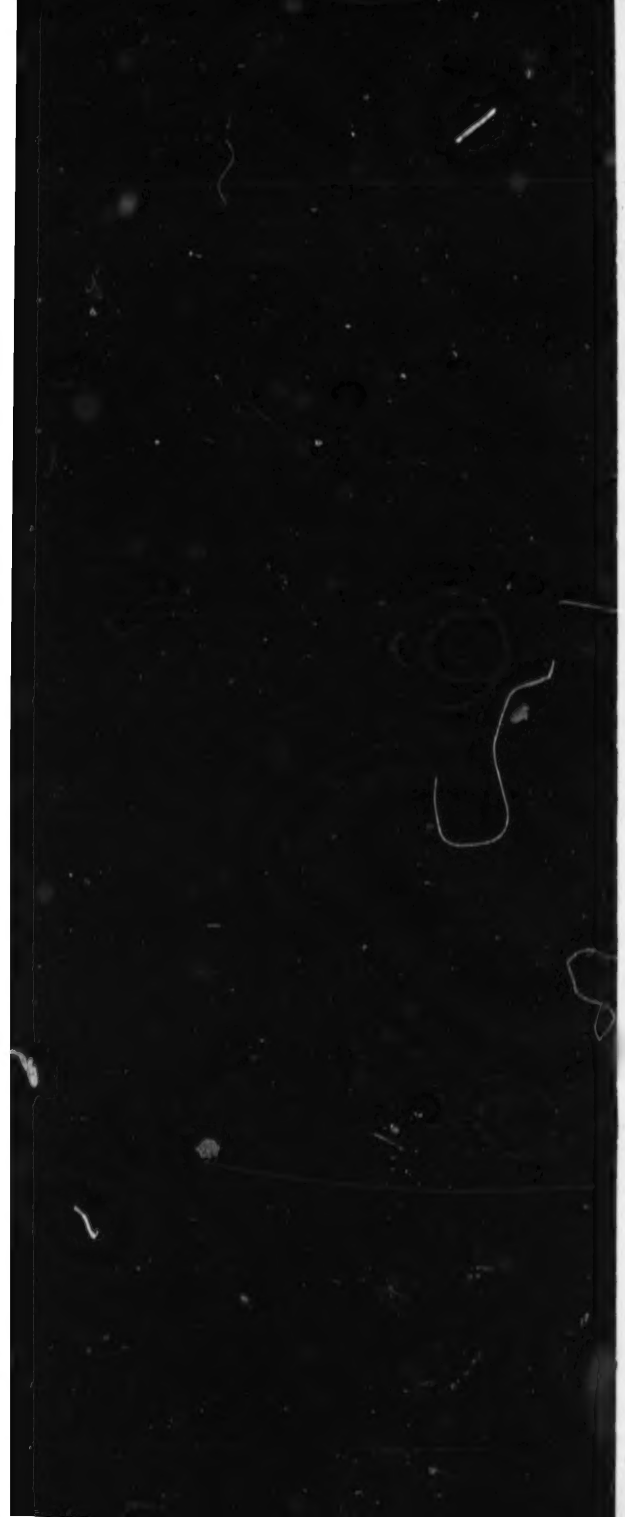
(c) Except as provided in su
this section, it shall be a misde
more than $100,000 or imprisc
or both, together with the cost
violate any provisions of sect
6o(2), or 12b of this title, or to
tioned in section 6 of this titl
required.

Section 6c, 7 U.S.C. § 13a-

§ 13a-1. Action to enjoin
writs and orders;

Whenever it shall appear to
market or other person has eng

gage in any act or pra
sion of this chapter or a
is restraining trading i
Commission may brin
the United States or th
tory or other place subj
to enjoin such act or p
chapter, or any rule,
courts shall have jurisd
That no restraining or
sions of this chapter sh
proper showing, a perm
ing order shall be gran
Commission, the distri
ed States courts of any
diction of the United S
writs of mandamus, or
any person to comply
rule, regulation, or ord
ing the requirement th
sary to remove the dan
rule, regulation, or ord
damus, or order affordi
action under this secti
the defendant is found
in the district where th
is about to occur, and
district in which the d
defendant may be fou
suant to this section, t
General to bring the
bring the action, it shal
and advise him of subs



§ 13a-2. Jurisdictio

(1) Whenever it s
State, the administr
such other official as
the residents of that
ened or adversely aff
tract market, clearin
engaging or is about
a violation of any pro
or order of the Comm
in equity or an actio
such act or practice,
any rule, regulation,
obtain damages on
further and other rel

(2) The district c
courts of any territ
States for the Distri
suits in equity and ac
force any liability o
regulation, or order
damages or other rel
cation, such courts sh
damus, or orders affo
to comply with the p
tion, or order of the C
ment that the defend
the danger of violati
tion, or order. Upon
injunction or restrai

(3) Immediately
State shall serve writ

provide the
Commission
action and, u
therein, and

(4) Any s
court of the U
the defendan
wherein the
occur, and pr
which the de
may be found

(5) For pu
tion, nothing
the administr
thorized Stat
them by the l
minister oath
nesses or the

(6) For pu
the United S
of Puerto Ric

(7) Nothi
rized State o
an alleged vi
ute of such S

Section 6(

§ 15. Enfor

For the pu
sions of this
proceeding u
any Adminis

Commission may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry. The attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing. In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Such court may issue an order requiring such person to appear before the Commission or member or Administrative Law Judge or other officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district wherein such person is an inhabitant or transacts business or wherever such person may be found.

Section 14, 7 U.S.C. § 18

§ 18. Complaints against registered persons

Petition

(a) Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j, or 6m of this title may, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded

by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission.

Investigation and hearing

(b) If there appear to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint made under this section, the Commission shall investigate such complaint and may, if in its opinion the facts warrant such action, have said complaint served by registered mail or by certified mail or otherwise on the respondent and afford such person an opportunity for a hearing thereon before an Administrative Law Judge designated by the Commission in any place in which the said person is engaged in business: *Provided,* That in complaints wherein the amount claimed as damages does not exceed the sum of $5,000, a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of fact.

Determination

(c) After opportunity for hearing on complaints where the damages claimed exceed the sum of $5,000 has been provided or waived and on complaints where damages claimed do not exceed the sum of $5,000 not requiring hearing as provided herein, the Commission shall determine whether or not the respondent has violated any provision of this chapter or any rule, regulation, or order thereunder.

Bond requirement when complainant is nonresident; waiver

(d) In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be

issued by the Commission against the complainant on any counterclaim by respondent: *Provided*, That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

Reparations

(e) If after a hearing on a complaint made by any person under subsection (a) of this section, or without hearing as provided in subsections (b) and (c) of this section, or upon failure of the party complained against to answer a complaint duly served within the time prescribed, or to appear at a hearing after being duly notified, the Commission determines that the respondent has violated any provision of this chapter, or any rule, regulation, or order thereunder, the Commission shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Commission under such rules and regulations as it shall prescribe, unless the respondent has already made reparation to the person complaining, may issue an order directing the respondent to pay to the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Commission with respect to the undisputed sum.

Enforcement of reparation award

(f) If any person against whom an award has been mad
not pay the reparation award within the time specified
Commission's order, the complainant, or any person for
benefit such order was made, within three years of the date
order, may file a certified copy of the order of the Commiss
the district court of the United States for the district in wh
resides or in which is located the principal place of business
respondent, for enforcement of such reparation award by
priate orders. The orders, writs, and processes of such c
court may in such case run, be served, and be returnabl
where in the United States. The petitioner shall not be lia
costs in the district court, nor for costs at any subsequent s
the proceedings, unless they accrue upon his appeal. If th
tioner finally prevails, he shall be allowed a reasonable atto
fee, to be taxed and collected as a part of the costs of the sui
ject to the right of appeal under subsection (g) of this secti
order of the Commission awarding reparations shall be fin
conclusive.

Review

(g) Any order of the Commission entered hereunder sh
reviewable on petition of any party aggrieved thereby, t
United States Court of Appeals for any circuit in which a h
was held, or if no hearing was held, any circuit in which the
lee is located, under the procedure provided in section 9
title. Such appeal shall not be effective unless within 30 day
and after the date of the reparation order the appellant als
with the clerk of the court a bond in double the amount
reparation awarded against the appellant conditioned up
payment of the judgment entered by the court, plus intere
costs, including a reasonable attorney's fee for the appellee
appellee shall prevail. Such bond shall be in the form of
negotiable securities having a market value at least equiva
the amount of bond prescribed, or the undertaking of a

company on the approved list of sureties issued by the T
Department of the United States. The appellee shall not b
for costs in said court. If the appellee prevails, he shall be
a reasonable attorney's fee to be taxed and collected as a
his costs.

Penalty

(h) Unless the registrant against whom a reparation or
been issued shows to the satisfaction of the Commission
fifteen days from the expiration of the period allowed f
pliance with such order that he has either taken an appeal
in authorized or has made payment in full as required
order, he shall be prohibited from trading on all contract
and his registration shall be suspended automatically at t
ration of such fifteen-day period until he shows to the sati
of the Commission that he has paid the amount therein s
with interest thereon to date of payment: *Provided,* Th
appeal the appellee prevails or if the appeal is dismissed t
matic prohibition against trading and suspension of regi
shall become effective at the expiration of thirty days f
date of judgment on the appeal, but if the judgment is sta
court of competent jurisdiction the suspension shall becon
tive ten days after the expiration of such stay, unless prior
the judgment of the court has been satisfied.

Effective date

(i) The provisions of this section shall not become effec
til fifteen months after October 23, 1974: *Provided,* Tha
which arise within one year immediately prior to the
date of this section may be heard by the Commission af
fifteen months period.

Section 17(b)(10), 7 U.S.C. § 21(b)(10)

§ 21(b)(10). Standards for registration; Commis

(b) An applicant association shall not be reg
tures association unless the Commission finds,
established by the Commission, that—

(10) the rules of the association provid
equitable procedure through arbitration or
settlement of a customer's claims and grieva
member or employee thereof: *Provided,* Th
such procedure by a customer shall be vo
procedure shall not be applicable to any cl
$15,000, (iii) the procedure shall not result
sory payment except as agreed upon between
(iv) the term "customer" as used in this sub
include a futures commission merchant or a

No. 80-936

IN THE

Supreme Court of the U

OCTOBER TERM, 1980

HEINOLD COMMODITIES, I
THOMSON & MCKINNON AUCHINCLOSS K

—v.—

NEIL LEIST, PHILIP SMITH and I

HEINOLD COMMODITIES, I
THOMSON & MCKINNON AUCHINCLOSS K

—v.—

NATIONAL SUPER SPUDS, INC.

**BRIEF IN OPPOSITION TO JOINT PETIT
OF CERTIORARI TO THE UNITED STA
APPEALS FOR THE SECOND C**

JUDAH I. LABOV
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New York, New
212-532-4800

*Counsel of Recor
National Super
and the Class*

Of Counsel:

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Pomerantz Levy Haudek
& Block
295 Madison Avenue
New York, New York 10017
212-532-4800

QUESTION PRESENTED F

**IS THERE AN IMPLIED PRIVATE
AGAINST FUTURES COMMIS
("FCMs") REGISTERED WITH TH
TURES TRADING COMMISSION
AGES SUSTAINED AS A CONSE
TION BY THE FCMs OF PR
COMMODITY EXCHANGE ACT
THEREUNDER SETTING TRADIN
SCRIBING CHEATING OR DEFRA
AND MANIPULATION OF PRICES?**

PARTIES BELO

Three separate actions were consoli
court below:

No. 79-7402

Appellants: Neil Leist, Philip Smi

Appellees: Heinold Commoditi
Thomson & McKinnon Auch
("Thomson"), Clayton Broke
The New York Mercantile
change"), Richard B. Levine
Alfred Pennisi.

No. 79-7464

Appellant: Incomco.

Appellee: The Exchange.

No. 79-7482

Appellants: National Super Spuds
ter, Jr., Willard C. Shiner, Eu
ard Welts, Raymond Rothberg

Theodore Brinek,
Romminger.

Appellees: Heinold and

Respondents National S
individual capacities and as
pursuant to Federal Rules o
are parties solely in No. 7
Only petitioners Heinold a
action. This response, there

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Supreme C

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NATIO

OPPOSITION TO
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Respondents Nat
they represent seek
ulation of the pri
contract ("the Con

of net long positions in the Contract during the final weeks of trading, respondents and the class claim that the market was manipulated and that the price of the Contract was artificially depressed to their detriment.

Petitioners Heinold and Thomson were two of the brokers (FCMs) for the holders of short positions in the Contract who were alleged to have manipulated the market.[1] The complaint alleges that petitioners aided and assisted the manipulation and failed to carry out rules and regulations designed to prevent such manipulation.[2]

Two causes of action against petitioners were included in the complaint. One asserted claims under various provisions of the Commodity Exchange Act ("the Act"), 7 U.S.C. § 1 et seq., which regulates trading in commodity futures and which proscribes manipulative activity. The second cause of action asserted a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, claiming that the concerted manipulation of the market price by respondents and their customers constituted unlawful price fixing.

After discovery, upon motion of petitioners, the District Court dismissed the count brought under the Act, concluding that no private cause of action could properly be implied for violation of the provisions of the Act. Although that decision did not dispose of the antitrust count, the District Court entered a final judgment pursuant to Federal Rule of Civil Procedure 54(b).

Respondents took a timely appeal from that final judgment to the Court of Appeals for the Second Circuit. In an exhaus-

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1 Respondents and the class have entered into a settlement with the holders of the short positions and those defendants below are therefore not parties to the petition.

2 The Exchange was also named as a defendant below. It too, with a third broker defendant—Clayton Brokerage Company of St. Louis, Inc.—has entered into a settlement with the class and is therefore not a party to the petition in No. 80-936.

tive opinion, the majority of the court (Judges Friendly and Kearse) concluded, based upon an analysis of the Act itself and its legislative history, that Congress, in reenacting the Act in 1974, intended to preserve an implied private cause of action against both the FCMs and the Exchange for violation of the provisions of the Act. The court below therefore reversed the judgment of the District Court and reinstated respondents' count under the Act. A request by petitioners and the Exchange for a rehearing en banc was denied. Petitioners have now sought discretionary review by this Court.

SUMMARY OF REASONS FOR DENYING THE WRIT

At the time the petition was filed in this case, there was no conflict among the Courts of Appeals as to the availability of an implied cause of action under the Act. In the six years since the Act was reenacted with amendments by Congress in 1974, the issue raised by petitioners had been decided by two Courts of Appeals, the court below and the Court of Appeals for the Sixth Circuit.[3] Both of those courts not only reached the same result—that traders do have a private cause of action under the Act against FCMs—but did so by virtually identical reasoning, based on applicable precedents of this Court relating to implication of private causes of action under federal statutes. Moreover, a third Court of Appeals—that for the Seventh Circuit—reached the same conclusion under the Act just prior to its reenactment in 1974.[4]

After the petition was filed, however, the Court of Appeals for the Fifth Circuit did decide *Rivers v. Rosenthal & Com-*

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3 *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980), petition for writ of certiorari filed August 9, 1980, No. 80-203.

4 *Deaktor v. L.D. Schreiber & Co.*, 479 F.2d 259 (7th Cir.), rev'd on other grounds sub nom. *Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973).

pany, No. 79-1313 (December 16, 1980)[5] in which it reache result contrary to that of the *Curran* court and of the co below. In terms of when courts may properly imply a priv cause of action under federal legislation, however, the result conflict is of limited significance. The Act was reenacted 1974, after consistent court decisions implying a private ca of action, but prior to this Court's decisions in *Transame Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11 (1979) *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979). narrow issue in *Curran,* in *Rivers* and in the court bel therefore, was the proper test of congressional intention in limited context of such a reenactment in the rather short t frame before the new and stricter standard adopted by Court for implication of private causes of action beca apparent. Consequently, beyond the Act itself, none of th decisions is likely to have any broad, precedential significar

Nor have petitioners demonstrated any justification for cretionary review of the decision below by any of the ot standards traditionally applied by this Court to petitions fo writ of certiorari. Nor have they demonstrated any ot analogous compelling reason for such review.

Neither the court below nor the Court of Appeals for Sixth Circuit departed from any accepted or usual course judicial proceedings. As mandated by this Court in *Cor Ash,* 422 U.S. 66 (1975), both courts sought to ascertain intention of Congress from the context of the Act itself from its legislative history. Both courts disavowed any atte at judicial legislation.

Likewise, the decision below and the *Curran* decision do conflict with the applicable decisions of this Court. The mary focus of both courts was to ascertain the intention Congress. Each of this Court's recent pronouncements v

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5 That opinion is reproduced in the Joint Appendix to Supplem Briefs filed by petitioners, Clayton and the Exchange. All page r ences will be to that Appendix.

respect to implication of private causes of action under feder statutes was carefully considered and applied to the facts a more particularly to the 1974 reenactment of the Act. While t *Rivers* opinion also purports to apply the same precedent unlike the *Curran* court and the court below, it does not gi adequate effect to the very close similarity of this case *Cannon v. University of Chicago,* 441 U.S. 677 (1979).

Since the decision in *Cort v. Ash,* this Court has spoken least eight times as to the standards to be used by the feder courts in determining whether a private cause of action may implied under federal statutes that do not expressly provi therefor. Restatement of those principles by the Court in th case would not only belabor the point, but because of t peculiar circumstances of the Act's reenactment in 1974, wou not really address the narrow issue presented here. Therefor no compelling interests would be served by discretionary revie by this Court.

REASONS FOR DENYING THE WRIT

I.

THE DIFFERENCE BETWEEN THE COURT BELO AND THE FIFTH CIRCUIT DOES NOT PRESENT A ISSUE OF SIGNIFICANT PRECEDENTIAL VALUE

At the time the petition in this case was filed, there was conflict among the Courts of Appeals as to the availability an implied cause of action under the Act. In the six years sin the "overhaul" of the Act (p. 4045),[6] the issue of the existen of private causes of action under the Act had been decided two Courts of Appeals, the Court below, with jurisdiction ov New York, one of the two major commodity markets in t United States, and the Court of Appeals for the Sixth Circuit

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6 Page references are to the opinion below as reproduced in t appendix to the Joint Petition.

Curran v. Merrill Lynch, Pierce, Fenner & Smith, F.2d 216 (6th Cir. 1980).[7] Those decisions not on conflict, but by very similar lines of reasoning reache identical conclusions. Both Courts of Appeals b analysis by recognizing that the proper approach w the four part test articulated by this Court in *Cort* v U.S. 66 (1975) (*Curran,* 622 F.2d at 233; the court b 4060). Both courts were also sensitive to the more arguably more restrictive standards developed by which have placed primary emphasis on the intent of such as *Transamerica Mortgage Advisors, Inc. v.* U.S. 11 (1979); *Touche Ross & Co. v. Redington,* 44 (1979); and *Cannon v. University of Chicago,* 441 (1979) (*Curran,* 622 F.2d at 234; the court below at p 20, 4071, 4092). Likewise, the *Curran* court and below gave careful consideration to the legislative his 1974 revision of the Act to better ascertain co intent.

As a result of the analysis described, the *Cu* concluded:

> Our analysis of the effect of the 1974 amendm Commodity Exchange Act, within the framewo *v. Ash,* persuades us that the amendments did the validity of the preexisting implied priva action. Rather, Congress appears to have arme investors with a supplementary remedy in c reparations procedures to be followed un authority. (622 F.2d at 235).

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7 At least two other Courts of Appeals also believe that of action are available under the Act after the 1974 although their statements to that effect were without disc *Lynch, Pierce, Fenner, Smith v. Goldman,* 593 F.2d 129 Cir. 1979); *Hirk v. Agri-Research Council, Inc.,* 561 F.2 (7th Cir. 1977).

The court below became aware of the *Curran* de
after its own independent and exhaustive analysis,
fully concurred with the Sixth Circuit:[8]

> Having answered the first and third *Cort* quest
> affirmative and the fourth in the negative, a
> found as to the second that there is ample e
> legislative intent to preserve a private remed
> clude, in accordance with the Sixth Circuit's
> *Curran v. Merrill Lynch* . . . that the district c
> error in holding that no private cause of action i
> for violation of the CEA existed. (pp. 4104-41

In addition to the two Courts of Appeals that had
the existence of private causes of action subsequent t
amendments to the Act, a third appellate court—th
Seventh Circuit—with jurisdiction over the other m
modity market in Chicago—did examine the question
Act just prior to its amendment. In *Deaktor v. L.D.*
& Co., 479 F.2d 529 (7th Cir.), rev'd on other gr
nom. *Chicago Mercantile Exchange v. Deaktor,* 41
(1973), it too reached the same result.

> We therefore hold that a private cause of ac
> under the Commodity Exchange Act in fav
> plaintiffs in these actions and that the district
> correct in permitting the plaintiffs to maintai
> tions under the Commodity Exchange Act. (4
> 534).

However, after filing of the petition, the Court o
for the Fifth Circuit did decide *Rivers v. Rosentha*
pany, No. 79-1313 (December 16, 1980) in which it
result contrary to that of the *Curran* court and of

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8 Judge Friendly, for himself and Judge Kearse, describe
opinion as "excellent and succinct. . . . (p. 4022 n.1).

below. In terms of when courts may prop
cause of action under federal legislation, h
conflict is of limited significance.

In *Cort, Transamerica* and *Touche Ro*
faced with statutes enacted by Congress
prior to enactment, of any preexisting judi
to the availability of an implied private cau
circumstance, the Court concluded that th
the intention of Congress and that it was i
proponents of such a cause of action
necessary congressional intent. Also, beca
not have relied upon decisions postdating
cases that had implied a cause of action fo
congressional intent could be ignored.

In the court below, and in *Curran* and
unusual factual situation was presented. A
one form or another, had been in the statu
it underwent substantial revision in 1974, i
of its coverage from certain specified agric
to inclusion of "all other goods and a
services, rights, and interests in which c
delivery are presently or in the future dealt
§ 2). The court below, therefore, as well
Rivers courts, all agreed that the congress
was that in 1974, not at some earlier time.[9]

Prior to the 1974 reenactment, however
as to the existence of an implied cause
antifraud and antimanipulation sections
remained unchanged) and had uniformly fo
action to exist.[10] Those decisions, then,
context in which Congress acted in 197
Transamerica or *Touche Ross*, in which a

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9 Court below at pp. 4071-72; *Curran*, 622
15a.

10 Court below at pp. 4054-55; *Curran*, 622 F
7a-8a.

to implication of private causes of actio
congressional intent, the existing law under
presumptively (and actually) known to Co
highly relevant to its intent. *Lorillard v. I*
580-81 (1975).

Moreover, the correctness under the mor
tive standards of *Cort, Transamerica* and *T*
pre-1974 cases interpreting the Act is likewi
examining the intent of Congress in 1974.
in *Rivers* has suggested that at the time c
ment, the state of the law was changing
decisions implying a cause of action cou
relied upon.[11] Rather, in determining Con
"contemporary legal context" had to be co
University of Chicago, 441 U.S. 677, 69
Court stated in *Brown v. GSA,* 425 U.S. 8

> . . . the relevant inquiry is not wh
> rectly perceived the then state of the l
> its perception of the state of the law

What led to the difference in result betw
and the *Curran* court on the one hand and
the other was not a difference of view as t
the 1974 reenactment or the applicability of
or *Touche Ross* to these facts. The sole poi
the placing of the burden of showing how
1974 to the then existing state of the law. T
the *Curran* court, correctly we submit, b
congressional awareness that courts had im
of action, the burden was on responde
congressional intent to alter the *status quo*
in a somewhat internally contradictory m

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11 *Rivers* at p. 8a.

12 See p. 15 n.20 *infra.*

burden on the proponents of a
demonstrate congressional intent t

Consequently, the difference in
of Appeals presents an issue of litt
the interpretation of the Act itself.
1975, Congress presumably woul
Court's decisions in *National R*
National Association of Railroad
(1974) and *Cort v. Ash*, 422 U.S
stricter trend they represent and th
ily have relied on earlier cases de
dards. On the other hand, as to
patterned on existing law, decisio
under whatever standard, would s
of Congress at the time of enacti
fore, could only arise again as to
prior to 1975 (or patterned after
before that date[14]) and which pri
construed as providing an implied

II.

THE COURT BELOW DID NO ACCEPTED AND USUAL PROCEED

Beginning with *Cort v. Ash*,
stressed that, before implying a pr
federal statute, a court must deter
of Congress. The constitutional s
the judiciary and legislature requ
preserves the appropriate distincti
two branches of government.

The court below, and the *Curra*
way from that course of judicial

13 *Rivers* at pp. 17a-20a.

14 See *Cannon v. University of Chi*

the four *Cort v. Ash* factors to t
majority below emphasized that
with its own notion of what wo
solely with the intention of Cong
this Court after *Cort v. Ash,* he

> . . . the effect of the deci
> that the ultimate touchston
> not judicial notions of what
> (p. 4092)

III.

THE COURT BELOW DID N TLED, IMPORTANT QUESTI CONFLICT WITH APPLI THIS C

The attention given by the cou
particularly to the intention of C
its decision is in conflict with an
Court.

> We turn now to the second
> tant, see *Touche Ross & C*
> *Cort* factors, "is there any i
> explicit or implicit, either to
> or to deny one?". . . . This
> examination of the legislativ
> ments. We conduct this, of
> the cautions in *Ernst & Ernst*
> 204 n.24 (1976) and *Piper v.*
> 430 U.S. 1, 31-32 (1977) a
> reliance on "passing referen
> gressional committee or sp
> not directly relevant to the i

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15 The *Curran* court likewise state

> Since the 1974 amendments, th
> centered primarily on the issu

In fact, it is petitione
disregarded the applicat
assertion that it is the inte
in 1974 that is determina
are correct that certain of
upon which respondents
reenacted without chang
cannot contest that the 1
ment of those sections a
Act's coverage. Consequ
reenacted, the court belo
of the law interpreting th
and Congress' awareness
no more than apply a ru
reaffirmed by this Court
580-81 (1978) that:

> Congress is presume
> judicial interpretati
> interpretation whe
> change. . . .

See also *Cannon*, supra,
States, 411 U.S. 526, 533

There can be little di
reenactment, those court
uniformly concluded that
was available under the
carefully analyzed in the
Deaktor opinion of the S
court below, therefore,
those decisions and adop

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enacting the 1974 am
scheme with the Con

16 As pointed out earlier
it was Congressional int

17 The presumption of co
on which the Court belo

However, such a pr
cause, as Judge Friendly
history confirms what c
to congressional awaren
persons had brought su
suant to the Act for fa
own rules. As Chairma
Agriculture pointed out
led exchanges to rescin
their potential liability.
What is of significance
Committee and eventua
regulation. Aware of th
regulation, Congress co
changes to enact necess
from such private cla
adopted. Instead, rathe
which it knew the co
§ 8(a)(7) (7 U.S.C. §
Futures Trading Comm
exchanges to alter or ad

As Judge Friendly ac

> Congress could no
> the underlying the
> compulsory regul
> private rights of a
> under the Act dem
> problem that had c
> right of action but
> the exchanges to a

23a, n.21. But in citing
to adopt the quote th
elected officials, like c
overlooked the corolla
edge may be assumed,
judicial interpretation
was the case of the an
Act.

Even Judge M
legislative history

> may demon
> gress of low
> under the A

although he disa
knowledge.[18]

Given the "aw
opinion below is
in *Cannon*. In fi
IX of the Educat
faced with a situ
a Court of App
under Title VI u
ing that Congres
others and appro

> It was *after*
> the other ca
> of its strict
> statute. We
> followed in
> gressional a
> temporary l
> in original)

This Court furth

> . . . in 197
> the impressi

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18 Judge Man
gate from the
Congress was
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19 *Cort v. Ash*
Act in this ca

action and
able. . . .
gress corre
rather wha
Brown v.
710-11)[20]

As in *Cannon*
1974 decisions r
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decisions by thi
as *Redington* a
was the intenti
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The court bel
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> Congress'
> that Congr
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> congressio
> are bound

the court below was quite cognizant of the reparations procedure included in § 14 (7 U.S.C. § 18) by the 1974 amendments. However, petitioners and the court in *Rivers* are in error in asserting that the inclusion of such an express remedy is irrefutable evidence of congressional disapproval of implied causes of action theretofore recognized by the courts. The correct rule of law is that stated by this Court in *National Railroad Passenger Corporation v. National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974):

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, court should not expand the coverage of the statute to subsume other remedies. . . . But even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent.

Consequently in *Cannon,* supra, at a time when this Court had already adopted a "decidedly different approach" to implication of private causes of action (441 U.S. at 699 n.24), the Court nonetheless stated:

> The fact that the other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section. (441 U.S. at 711)

The court below, therefore, correctly concluded that the reparations procedure did not end its inquiry of whether there was evidence of legislative intent to preserve a private cause of action. It found such clear legislative intent manifested in several respects, including the narrowness of the reparations procedure (that procedure does not include exchanges or traders such as the holders of short positions on whose behalf petitioner FCMs acted, all of whom were defendants in this case[21]), the general intent of Congress, often expressed, that

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21 See footnote 1 supra.

the 1974 amendments were intended to strengthen the Act and its enforcement, statements by key members of Congress that the reparations procedure was not intended to diminish court jurisdiction, and in the language of the jurisdictional savings clause, § 2(a)(1) (7 U.S.C. § 2), enacted in 1974. (pp. 4082-4090)

It is also true that some provisions of the Act upon which respondents rely for their cause of action proscribe certain conduct as criminal. If these provisions stood alone as "bare criminal statutes," that fact might militate against implication of a private cause of action. *Cort v. Ash*, 422 U.S. 66, 79-80 (1975). But they do not. They are part of a much broader statutory scheme providing for regulation of the commodities industry, much akin to the regulation of the securities industry provided for in the Securities Act of 1933 and the Securities Exchange Act of 1934. As petitioners themselves have pointed out, the Act also includes provisions for civil enforcement including actions by the CFTC for injunctive relief. In that respect, the Act bears much closer resemblance to those statutes referred to in footnote 11 of *Cort v. Ash* (422 U.S. at 79 n.11), for which private causes of action were implied, rather than the statute which was at issue in *Cort v. Ash* itself.[22]

In sum, the opinion of the majority below evidences great familiarity with the prior decisions of this Court applicable to the issue at hand. More importantly, the court below demonstrated a scholarly understanding of those opinions and a careful analysis of their interrelationship, particularly as applied to the particular statute at issue and the circumstances of its reenactment.

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22 Indeed if the Act did not, as it does, contain any proscriptive provisions, that might itself preclude implication of a private right of action. *Redington*, supra, 442 U.S. at 576.

IV.

NO OTHER COMPELLING REASON EXISTS FO GRANTING THE WRIT.

Since the decision in *Cort v. Ash,* this Court has spoken least eight times[23] as to the standards to be used by the fede courts in determining whether a private cause of action may implied under federal statutes that do not expressly provi therefor. In the October 1978 Term alone, certiorari w granted in five cases which posed that issue. See *Redingto* supra, 442 U.S. at 562 n.1. The Court could not state mo clearly than it already has that the question is "one of statuto construction" and that the task of the judiciary "is limit solely to determining whether Congress intended to create t private right of action asserted. . . ." (442 U.S. at 568). T Court has also taken great pains to articulate appropriate ru of statutory construction for the performance of this task.

Petitioners' request for discretionary review to repeat tho rules in connection with the Act, therefore, prompts citation the Court's conclusion in *Kissinger v. Reporters Committee f Freedom of the Press,* 445 U.S. 136, 148 (1980) that:

> This Court has spent too many pages identifying t factors relevant to uncovering congressional intent imply a private cause of action to belabor the topic her

Divination of congressional intent is, as often as not, imprecise science. Although a question of law, it is a ta which involves a fact finding process, based on the structure the statute involved as a totality, the legislative history relati

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23 *Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1 (1977); *Santa C Pueblo v. Martinez,* 436 U.S. 49 (1978); *Chrysler Corp. v. Brown,* U.S. 281 (1979); *Cannon v. University of Chicago,* 441 U.S. (1979); *Davis v. Passman,* 442 U.S. 228 (1979); *Touche Ross & Co Redington,* 442 U.S. 560 (1979); *Transamerica Mortgage Advisor Lewis,* 444 U.S. 11 (1979); *Kissinger v. Reporters Committee Freedom of the Press,* 445 U.S. 136 (1980).

to the Act, and the reasonable inferences as to congressi intent that may be drawn from both.

What petitioners are really questioning, therefore, is whether the court below applied the proper standard or the right rules of statutory construction, but rather the corr ness of the facts found by the court below and the infere drawn therefrom as to congressional intent. In essence tioners simply disagree with the majority's conclusion a what the intent of Congress was.

Certiorari, however:

> . . . is not, and never has been, primarily concerned the correction of errors in lower court decisions. In al all cases within the Court's appellate jurisdiction, petitioner has already received one appellate review o case. . . . The function of the Supreme Court is, t fore, to resolve conflicts of opinion on federal quest that have arisen among lower courts, to pass upon q tions of wide import under the Constitution, laws, treaties of the United States, and to exercise supervi power over lower federal courts. If we took every cas which an interesting legal question is raised, or our *p facie* impression is that the decision below is erroneo we could not fulfill the Constitutional and statutory sponsibilities placed upon the Court.[24]

Finally, the specter raised by petitioners that the deci below threatens the industry with an uncontemplated "e mous liability" and will open the courts to vexatious litiga (Petition pp. 4-5) is simply unfounded. Independent of private cause of action asserted under the Act, FCMs (inc ing petitioners)[25] remain liable under the antitrust laws,

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24 Chief Justice Vinson, "Work of the Federal Courts," Address t American Bar Association, September 7, 1949, 69 Supreme C Reporter V.

25 As to petitioners, even after the decision of the District C dismissing all counts under the Act, an antitrust count remains

(footnote continued on next

particularly § 1 of the Sherman Act (15 U.S.C concerted market manipulation.[26] The impact of su from which Congress clearly did not insulate the ind the threat of treble damages, belies any notion tha was particularly concerned about protecting the ind large liabilities.

CONCLUSION

The opinion below which found an implied privat action under the Act is consistent with the decisic Court and well supported by the record regarding th Congress. No purpose would be served by this Cou of that opinion. The petition for a writ of certior therefore be denied.

Respectfully submitted,

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National Super Spuds,
and the Class

Of Counsel:

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212-532-4800

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trial. Consequently even were the Court of Appeals r tioners would have to defend against the claim for treble

26 In the court below, both the majority (p. 4088) and th 4170-71) found that the 1974 amendments to the CEA liability under the antitrust laws of persons involved in t tion of the commodities markets.

MOTION FILED
JAN 5 1981

No. 80-757

IN THE

Supreme Court of the United

OCTOBER TERM, 1980

HEINOLD COMMODITIES, INC., TH
MCKINNON, AUCHINCLOSS, KOHLM

v.

NEIL LEIST, PHILIP SMITH, AND

HEINOLD COMMODITIES, INC., TH
MCKINNON, AUCHINCLOSS, KOHLM

v.

NATIONAL SUPER SPUDS, INC.

ON PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS FOR THE SE

MOTION OF FUTURES INDU ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, and BRIEF *AMICUS CURIAE* IN SUPP THE JOINT PETITION FOR WRIT OF

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January 5, 1981

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While petitioners in this case have filed a detailed, persuasive brief in support of their joint petition for a writ of certiorari, FIA believes that the petition did not address a number of questions of statutory construction and the case law of this Court.

Specifically, petitioners did not have the opportunity to address the recent split in the circuits caused by the unanimous decision of the Court of Appeals for the Fifth Circuit holding that no implied private right of action exists under the Act against FCMs.* In addition, petitioners did not fully address the structure and language of the Act, the propriety of the *Leist* majority opinion's reliance on precedents drawn from the securities field, and the issue of primary jurisdiction. FIA believes that these factors are persuasive in determining whether to grant the petition for a writ of certiorari and, ultimately, to reverse the decision of the Second Circuit.

THEREFORE, FIA respectfully requests leave of this Court to file the accompanying brief *amicus curiae* in support of the point petition for a writ of certiorari.

Respectfully submitted,

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Counsel for Futures Industry Association, Inc., As Amicus Curiae

Of Counsel:

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Baer Marks & Upham
299 Park Avenue
New York, New York 10171

January 5, 1981

* *Rivers* v. *Rosenthal & Co.*, No. 79-1313 (5th Cir. Dec. 16, 1980) (unanimous opinion).

No. 80-757

IN THE

reme Court of the United States

OCTOBER TERM, 1980

OLD COMMODITIES, INC., THOMSON & NON, AUCHINCLOSS, KOHLMEYER, INC.,
Petitioners,

v.

LEIST, PHILIP SMITH, AND INCOMCO,
Respondents.

OLD COMMODITIES, INC., THOMSON & NON, AUCHINCLOSS, KOHLMEYER, INC.,
Petitioners,

v.

ATIONAL SUPER SPUDS, INC., Et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE OF FUTURES INDUSTRY OCIATION, INC., IN SUPPORT OF THE JOINT PETITION FOR WRIT OF CERTIORARI

rief is submitted on behalf of Futures Industry on, Inc., ("FIA") as *amicus curiae* in support of petition for a writ of certiorari to the United urt of Appeals for the Second Circuit filed by Commodities, Inc., and Thomson & McKinnon, ss, Kohlmeyer, Inc.

MENT OF INTEREST

-profit corporation whose members
rs are futures commission merchants
cial users of futures markets, and
tures trading, including major banks.
its FCM members effect more than
commodity futures trading activity
tract markets[1] on behalf of members
cision of the United States Court of
d Circuit leaves FCMs subject to con-
s of the Commodity Exchange Act (the
1-24 (1976 & Supp. II 1978) by the
Trading Commission (the "CFTC")[2]
l imposes on FCMs the burden of de-
n overlapping, redundant proceedings.

the Second Circuit's decision con-
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and the legislative history of the Act,
the conclusion that Congress did not
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is of the legislative material and de-
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sion to maintain a market for trading futures
U.S.C. § 6 (1976).

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[18] *Accord,*
(1979); *Can*
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v. *University of Chica*
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carry with it a right

Futures trading is
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7a(12) (1976); 17 C.F
futures trading, ma
otherwise rely on the
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system[20] designed to
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such prohibition do
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gage Advisors, Inc.
tions 4a, 4b, and 9(b
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[19] In contrast, secu
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transferred by gift.

[20] *See* Act § 3, 7 U.
2d Sess. 9-10, *reprinte*
2087, 2097-98; H.R. R
Rivers v. *Rosenthal &*
Cir. Dec. 16, 1980).

[21] *Accord, Cort* v.
Investor Protection Co

were not enacted for the prote
particular group.

Judge Friendly observed, a
4b of the Act reaches beyond t
ship to prohibit fraud in the sa
erally, not just when the defrau
party being defrauded. *Leist*,
Seventh Circuit lent some supp
Hirk v. *Agri-Research Council*
(7th Cir. 1977) (holding that se
to conduct before an account r
agency or fiduciary relationship
in this manner, section 4b cle
broad regulatory scheme desig
as a whole; it was not enacted to
cular group.

Similarly, section 4a(1) (7 U
powers the CFTC to impose tra
market participants, but, by the
ute, to protect those who rely o
verse effects of excessive specu

Section 9(b) (7 U.S.C. § 13
statute enacted to enforce and
poses of the Act. It is well settl
of criminal penalties, while not
of action, does not support it eit
enacted for a public purpose.
U.S. 66 (1975). Section 9(b)
merely an enforcement mechani

**B. Even if the Act was cre
especial class, no such pri**

Even if the Act is found to
the benefit of an especial class, it
that members of that class have

In *Transamerica Mortgage Advisors, Inc.* U.S. 11 (1979), this Court refused to imply a of action under section 206 of the Investm Act of 1940, which proscribes conduct almos that prohibited by section 4b of the Act and most identical language. Justice Stewart, w majority, stated,

> Section 206 of the Act here involved c intended to protect the victims of the fra tices it prohibited. But the mere fact th was designed to protect advisers' client quire the implication of a private cause damages on their behalf.

Id. at 24; *see Touche Ross & Co.* v. *Redin* 560, 570, 578 (1979); *Securities Investor Pr* v. *Barbour*, 421 U.S. 412, 421 (1975) (stat enacted specifically to protect customers of b nevertheless does not contain an implied pr action, even in favor of the particular class protected).[22]

C. The Commodity Futures Trading Com sive jurisdiction and the uniform reg created by Congress both preclude such of action.

Given the need to maintain a nationally latory system, section 2 of the Act vests exc tion over futures trading in the CFTC.

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[22] Moreover, where a statute creates proceeding ment and sets forth a wide range of alternative reme ment mechanisms, this Court has been reluctant to ones. *Transamerica Mortgage Advisors, Inc.* v. *Le* 19-22 (1979); *Touche Ross & Co.* v. *Redington*, 4 (1979); *Securities Investor Protection Corp.* v. *B* 412, 419-21 (1975); *National Railroad Passenger Ass'n of Railroad Passengers*, 414 U.S. 453, 457- relevant sections of the Act are set forth in Judge M *Leist*, slip op. at 4118-24.

provisions" in section 2 of the Act, which state that the jurisdiction of the Securities and Exchange Commission and federal and state courts shall not be impaired, have been closely analyzed by both the Fifth Circuit and Judge Mansfield below. These analyses demonstrate that the savings clause is not to the contrary. *See Rivers* v. *Rosenthal & Co.*, No. 79-1313, typed opinion at 16-17 (5th Cir. Dec. 16, 1980); *Leist*, slip op. at 4170-74 (Mansfield, J., dissenting). This exclusive jurisdiction does not rest solely on expertise, but on a desire to maintain national uniformity in interpretations of the Act. *See* note 20 *supra* and accompanying text.

If the relief provided by the Act proves inadequate to those who have claims against FCMs relief may well be available in state courts under common law contract and tort theories.[23] The situation is analogous to the labor law area where this Court has insisted that primary jurisdiction lies with the NLRB to determine violations of the National Labor Relations Act. This primary jurisdiction has been vested in the NLRB to further Congress' goal of uniform national regulation of labor relations by ensuring that the Act receives interpretations only from a central decision-making body. *See San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 241-44 (1959). Despite this strong policy, this Court has permitted actions under state common law for such wrongs as trespass and assault. *See, e.g., Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978).[24] In this way, the Court has balanced the need to ensure national uniformity in interpretations of federal labor statutes while

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[23] *See Witzel* v. *Chartered Systems Corp.*, 490 F. Supp. 343 (D. Minn. 1980) (holding that state common law causes of action have not been preempted by the Act).

[24] *Accord, Farmer* v. *United Brotherhood of Carpenters and Joiners*, 430 U.S. 290 (1977); *International Ass'n of Machinists* v. *Gonzales*, 356 U.S. 617 (1958); *UAW* v. *Wisconsin Employment Relations Board*, 351 U.S. 266 (1956).

permitting the states to afford traditional common law protections to its citizens. The same policy should apply to FCMs and futures trading.

D. Precedents construing the securities laws are not applicable to the Act.

Judge Friendly relied heavily on decisions by this Court and circuit courts finding implied rights of action under the securities laws to sustain his findings of congressional intent. However, the many significant differences between securities markets and futures markets, and in their respective statutory schemes,[25] preclude extensive reliance on securities case law. Both the securities laws and the Act are broad comprehensive statutory schemes designed to suit the needs of their own respective industries. On this basis alone, there is no ground for reasoning that Congress relied on these cases to create a private right of action under the Act.

In addition, as emphasized by this Court's decisions in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 570, 578 (1979), whether an implied right of action exists is a fact sensitive issue. Thus each analysis is by its very nature *sui generis*. It is singularly inappropriate to rely on the holdings in one area as evidence that another statute or another section of the same statute supports an implied private right of action.

Whatever the resemblance of section 4b of the Act to the antifraud provisions of the Securities Exchange Act, the Supreme Court has made it clear that its finding of an implied private right of action under section 10(b) of the Securities Exchange Act (15 U.S.C. § 78j(b) (1976)) has no such precedential value. It has, for example, refused to

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[25] *See* Bianco, "The Mechanics of Futures Trading: Speculation and Manipulation," 6 *Hofstra L. Rev.* 27, 34 (1977).

a private cause of action under a similarly worded
on in the Investment Advisors Act. *Transamerica*
ge Advisors, Inc. v. *Lewis*, 444 U.S. 11, 19-24 (1979).

CONCLUSION

the reasons stated above, the request for a writ of
ari should be granted and the decision of the United
Court of Appeals for the Second Circuit should be
d.

Respectfully submitted,

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y 5, 1981

No. 80-936

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

e Court of the United States

October Term, 1980

D COMMODITIES, INC., THOMSON &
N AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

vs.

IST, PHILIP SMITH AND INCOMCO,

Respondents.

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tition for a Writ of Certiorari to the
es Court of Appeals for the Second Circuit

DENTS' OPPOSITION TO A SECOND ON FOR LEAVE TO FILE BRIEF AMICUS CURIAE

LEONARD TOBOROFF
950 Third Avenue
New York, New York 10022
(212) 832-2310
Counsel for Respondents

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PARTIES BELOW

The parties to the three consolidated appeals b

No. 79-7402

Appellants: Neil Leist, Philip Smith and Incomc

Appellees: Heinold Commodities, Inc. ("Heinold son & McKinnon Auchincloss Kohlmeyer Inc. son"), Clayton Brokerage Co. of St. Louis, Mercantile Exchange ("Exchange"), Richard Howard Gabler and Alfred Pennisi.

No. 79-7464

Appellant: Incomco,

Appellee: Exchange.

No. 79-7482

Appellants: National Super Spuds, Inc., Willia ter, Jr., Willard C. Shiner, Eugene P. Weisma Welts, Raymond Rothberg, Arthur S. Armstrong, Brinek, Capgain Holdings, Inc. and Heiz Romm

Appellees: Heinold and Thomson.

Heinold and Thomson seek review of the judgm 79-7402 and No. 79-7482. Heinold and Thomson parties to the appeal in No. 79-7464.

Heinold and Thomson are corporations. A listi parent companies, subsidiaries and affiliates a their Joint Petition for a Writ of Certiorari to t States Court of Appeals for the Second Circui No. 80-936.*

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*The following abbreviations are sometimes used in th "CEA" for the Commodity Exchange Act, as amended § 1 *et seq.*); "CFTC" for Commodity Futures Trading C "FCM" for futures commission merchant. The decision below, *Leist* v. *Simplot*, 638 F.2d 283 (2d Cir. 1980), is as *Leist*. The page numbers to the majority and dissenti used in this brief are the page numbers appearing in the Jo dix (J.A.). *Rivers* v. *Rosenthal & Co.*, No. 79-1313 (5t 16, 1980), is referred to as *Rivers*. The page numbers to opinion used in this brief are the page numbers appear Joint Appendix to Supplemental Briefs in Support of P Writs of Certiorari to the United States Court of Appe Second Circuit filed by all petitioners in these consolid (J.A.S.).

QUESTION PRESENTED FOR REVIEW

Did Congress create an implied cause of action for dam ages against commodity brokers under the following pr visions of the Commodity Exchange Act:

(i) Section 4a which authorizes the Commodi Futures Trading Commission, formerly the Co modity Exchange Commission, to set speculative tra ing and position limits for specific commodity futur contracts and which makes it unlawful to exceed tho limits;

(ii) Section 4b which makes it unlawful for a me ber of a commodity exchange to "cheat or defraud" h customers; and

(iii) Section 9(b) which makes it a felony for a person "to manipulate . . . the price of any commodi in interstate commerce, or for future delivery on subject to the rules of any contract market, or to corn . . . any such commodity . . ."

despite expressly providing many judicial and administr tive means of enforcing these provisions including crimin penalties, civil fines and an administrative remedy f respondents' claims.

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F IMPLICATION OF UNEXPRESSED PRI-VATE RIGHTS OF ACTION FOR DAMAGES IS CONSTITUTIONALLY PERMISSIBLE, THE PROPER TEST FOR SUCH IMPLICATION IS THAT SET FORTH BY THIS COURT IN SUCH RECENT DECISIONS AS *TRANS-AMERICA, REDINGTON, AMTRAK* AND *SIPC*: A RIGHT MAY BE IMPLIED ONLY WHEN THE PROPONENT OF THE RIGHT MAKES A CLEAR AND UNAMBIGUOUS SHOWING OF AFFIRMATIVE CONGRES-SIONAL INTENT TO CREATE IT 15

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Article I .....

Article III .....

No. 80-936

(Consolidated with Nos. 80-757 and 80-895)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC., *Petitioners*

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO, *Respondents*

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC., *Petitioner*

v.

NATIONAL SUPER SPUDS, INC., *et al.*, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PETITIONERS HEINOLD COMMODITIE INC. AND THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.

OPINIONS BELOW

The opinions of the Court of Appeals majority and d sent (J.A. 83-249) are reported at 638 F.2d 283 (2d C 1980). The opinion of the District Court (J.A. 60-77), wh judgment was reversed by the Court of Appeals, is repor at 470 F.Supp. 1256 (S.D.N.Y. 1979).

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1980. The Court of Appeals denied petitioners' timely petitions for rehearing and suggestion for rehearing en banc on September 9, 1980. This Court granted these petitioners' timely Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit on February 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 4a, 4b and 9(b) of the Commodity Exchange Act, as amended (7 U.S.C. §§6a, 6b and 13(b)), and article I, section 1 of the United States Constitution are set forth in these petitioners' Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. Article I, section 7, clause 2 and article III, section 1 of the United States Constitution are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

These cases arise out of trading in May 1976 Maine potato futures contracts ("May Contracts") on the Exchange during March, April and May 1976. Petitioners are commodity brokers. As required by law, they are registered as "futures commission merchants" with the CFTC.

Respondents are traders who held long positions in May Contracts which were liquidated prior to the close of trading on May 7, 1976. All of these respondents are admittedly "speculators" as distinct from "hedgers," the latter being persons who produce, use, handle or merchandise a particular commodity. None of the respondents was a customer of these petitioners with respect to the purchase of their "long" contracts. Indeed, petitioners acted as brokers for persons on the opposite side of the market from respondents ("short sellers").

976, the CFTC commenced an investigation of in May Contracts and the failures in delivery contracts. This investigation led to administra- ings against certain short sellers and agents their brokerage firms, the Exchange and var- who traded from the long side of the market.[1] short brokers who are petitioners in this Court d with any violation of the CEA by the CFTC.[2] ases in which these petitioners are defendants with violations of Sections 4a, 4b and 9(b) . Section 4a, which was enacted in 1936, au- CFTC to set speculative trading and position mmodity futures contracts and makes it unlaw- d those limits. Section 4b, which also was en- 6, makes it "unlawful to cheat or defraud" a connection with the making of futures con- ion 9(b) prohibits any person from manipulat- e of or cornering any commodity in interstate r for future delivery on or subject to the rules nodity exchange. This language was added in ion 9 of the Grain Futures Act of 1922. All three criminal provisions.

hese sections, nor any other provision of the ssly authorizes the institution of damages ac- aders in the federal courts. Moreover, unlike es Exchange Act of 1934, the CEA contains no nt of jurisdiction to the federal courts to hear s.

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tter of Peter J. Taggares et al., CFTC Docket No. *Matter of the New York Mercantile Exchange*, CFTC 7-14; *In the Matter of Harold Collins et al.*, CFTC 7-15.

o. 95-1181, 95th Cong., 2d Sess. 98-99 (1978) contains tion of the "Maine Potato Case."

e CEA does, however, expressly provide for fines and sonment in criminal prosecutions, and for numerous judicial and administrative means of enforcing these sions. Among those means, enacted in 1974, is an istrative proceeding before the CFTC for the redress y person's claims or grievances against FCMs such as oners. Respondents' claims for damages against the oners could have been presented and adjudicated in such ministrative proceeding.

e District Court granted these petitioners' motions for ary judgment on the counts in the complaints which e violations of Sections 4a, 4b and 9(b) of the CEA. espondents appealed and, over the vigorous and well- ned dissent of Judge Mansfield, the Court of Appeals sed.[3] This Court granted petitioners' timely Joint ion for a Writ of Certiorari on February 23, 1981.

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reaching its decision, the District Court applied the test iated in *Cort* v. *Ash*, 422 U.S. 66 (1975), and applied in *Can-*. *University of Chicago*, 441 U.S. 677 (1979). The District did not have the benefit of this Court's decisions in *Trans-ca Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), and *e Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). The District held that no private right of action against brokers existed se "two critical elements of the [*Cort* v. *Ash*] test, congressional and consistency with the statutory scheme, weigh strongly t the implication of such a right." (J.A. 72).

SUMMARY OF ARGUMENT

icle I of the Constitution, federal law is made
nactment of Congress. For this reason, the ju-
os its constitutional role when, as did the court
nterprets" an unambiguous statute to create
mages clearly omitted from the text of the
even if the judiciary considers legislative intent
y structure, this Court's decisions in *Touche*
v. *Redington*, 442 U.S. 560 (1979), and *Trans-*
rtgage Advisors, Inc. v. *Lewis*, 444 U.S. 11
e clear that a right to damages can be im-
statute only if the proponent of the right can
convincingly that Congress affirmatively in-
eate the right which it failed to express in the

a, 4b and 9(b), which were enacted in 1936,
ot create a right to damages in private parties.
lly prohibit "cheat[ing] or defraud[ing]" of
nanipulation of the commodity markets, and
speculative trading, carrying criminal sanctions
lation. The text of these provisions is strikingly
206 of the Investment Advisors Act of 1940,
merica construed not to permit private suits
. Indeed, there is less reason for implication in
ecause speculators like respondents are not the
eficiaries of Sections 4a, 4b and 9(b).

ative history of the 1936 Act provides no evi-
Congress intended these general prohibitions to
le in private damages actions. Furthermore, the
the Securities Exchange Act of 1934, contains
grant of jurisdiction to the federal courts to
ch actions.

ant to the intent of Congress
nts to the CEA in 1974 provide
ngress did not intend to create
. That Act confers awesome en-
newly-created federal agency,
letailed, express administrative
Act. When it adopted this ad-
ess considered and rejected a
ovided a right of action for
rts. This rejection, under this
l *Railroad Passenger Corp.* v.
Road Passengers (*"Amtrak"*),
bstantial indicia" of intent not

ored the text of the statute
n 1936. It concluded that the
ne CEA with knowledge and
ction implying a right of action
he canon of statutory construc-
f a statute incorporates a pre-
erpretation, the majority in-
question was not whether Con-
o create a new private right
whether petitioners could make
owing" that Congress intended
n. (J.A. 146). But the statute
re-enacted in 1974. Also, the
re, as here, the amended statute
Lorillard v. *Pons*, 434 U.S. 575
ns in question were by no means
construction. Only a small num-
red the question of an implied
m relied entirely on one district
learly incorrectly decided even
pronouncements of this Court.

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S. 607, 618

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175 U.S. 414, 419 (1899).

In the present case there is
doubtful meaning to be construe
single word in any of Sections 4
that Congress intended to crea
for damages.

**D. Under the Constitution, th
guage in the Text of a
Right of Action for Dama
Whether Congress Create**

Under articles I and III of t
statute is a failure to legislate w
into legislation in the courts by
tent. The most current theory ra
private remedies not expressed i
congressional intent to create su
to give expression to that intent
may nonetheless be given effe
intent is supposed to be divined
of the statute, its structure o
enactment.

This assumes that if Congres
a damages remedy, even if it did
the courts may treat as *done* wh
But articles I and III explicitl
and how to do it; and it is err
court determines Congress only
Constitution, the courts must n
gress would have done had it e

E. The Tests Laid Down in *Cort* v. Logical Basis Under the Constitut the "Implication" of a Private Ri Damages Not Explicitly Enacted b

Cort v. *Ash*, 422 U.S. 66 (1975), advan as to how under our Constitution a right ages could be declared by the courts the express enactment of such a right Instead, it merely assumed the existence

> "In determining whether a private in a statute not expressly providing are relevant." 422 U.S. at 78.

These "several factors" are at best c interpreting the intent of the language as this Court has recently made clear. not square the result they are intended t requirements of the constitutional sepa

The first factor: whether the plaintiff i for whose *especial* benefit the statute rives solely from *Rigsby* and merely the outmoded and logically insufficient '

The second test: whether there is "any lative intent, explicit or implicit, either to edy or to deny one," merely assumes legislate can be regarded as the equivale proposition which, correctly stated, defe

The third test: whether it is "consiste lying purposes of the legislative schem remedy," implies that the court may legi if what it creates is "consistent" with tually enacted. This would be an open i unlimited judicial legislation.

The fourth test is a negative one: wh cause of action is a matter in an area ba of the states. But if it were basically

federal government, that in itself would not justify a
ference that Congress intended to do something abou

Thus, obviously not a single one of the *Cort* tests
explain how a court, consistent with the Constitution,
assume that Congress did enact a cause of action for
ages without making this fact explicit and clear in the a
language it enacted—that is, in the "four corners of
Act" as *Amtrak* insisted be done.

II. IF IMPLICATION OF UNEXPRESSED PRIV RIGHTS OF ACTION FOR DAMAGES IS CON TUTIONALLY PERMISSIBLE, THE PROPER T FOR SUCH IMPLICATION IS THAT SET FO BY THIS COURT IN SUCH RECENT DECISION *TRANSAMERICA, REDINGTON, AMTRAK SIPC*: A RIGHT MAY BE IMPLIED ONLY W THE PROPONENT OF THE RIGHT MAKE CLEAR AND UNAMBIGUOUS SHOWING AFFIRMATIVE CONGRESSIONAL INTENT CREATE IT.

Even if a right of action for damages could constitutio
be implied in the absence of express statutory language,
erence to the doctrine of the separation of powers requ
that such a right be implied only when the evidence of
gressional intent is clear and unequivocal. As Justice Po
wrote in *Cannon*, 441 U.S. at 731: "Absent the most
pelling evidence of affirmative congressional intent, a fed
court should not infer a private cause of action."

The "central inquiry" and "dispositive question"
therefore, whether Congress clearly intended to mak
private right of action for damages available to a spe
class of litigants. *Redington*, 442 U.S. at 575; *Transame*
444 U.S. at 23. If the "dispositive question . . . whe
Congress intended to create any such remedy" is answ
in the negative, the "inquiry is at an end." *Id.* at 24.

Those who contend that "'a statute has endowed them h a cause of action must establish their proposition,' their failure to demonstrate Congress' intent to provide ause of action compels the denial of such actions." *Rivers Rosenthal & Co.*, No. 79-1313 (5th Cir. Dec. 16, 1980) A.S. 16a); *Leist* (J.A. 177) (Mansfield, J., dissenting).[7] Express statutory provision of other judicial and admin-rative means of enforcement is strong evidence that Con-ess did not intend to create an unexpressed private damages nedy. *Transamerica*, 444 U.S. at 20; *Redington*, 442 U.S. 574; *Securities Investor Protection Corp.* v. *Barbour*, U.S. 412, 419 (1975); *Amtrak*, 414 U.S. at 458; *Botany orsted Mills* v. *United States*, 278 U.S. 282, 289 (1929); nnon, 441 U.S. at 749 (Powell, J., dissenting). Where, here, these express means of enforcement are broad in ope and detailed in nature, there is even less "justifica-on for implying an unmentioned additional private rem-y." *Leist* (J.A. 182) (Mansfield, J., dissenting). *See ransamerica*, 444 U.S. at 20; *Redington*, 442 U.S. at 571-72; *mtrak*, 414 U.S. at 458.

Application of these principles in these cases leads to e inescapable conclusion that Congress did not create ghts of action for damages for the alleged violations of ections 4a, 4b and 9(b).

II. THE TEXT AND LEGISLATIVE HISTORY OF THE 1936 ACT PROVIDE NO EVIDENCE THAT CONGRESS INTENDED TO CREATE A CAUSE OF ACTION FOR DAMAGES FOR VIOLATION OF SECTIONS 4a, 4b AND 9(b).

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[7] This Court has made clear that even when an implied private emedy is available under a specific statutory provision, it is not neces-arily available to all classes of plaintiffs under the same provision or vailable to anyone under other provisions of the statute. *Redington*, *upra*; *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *Santa Fe Industries, Inc.*, v. *Green*, 430 U.S. 462 (1977); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

e Text of Sections 4a, 4b and 9(b) Does Not en Hint That These Provisions May Give Rise Civil Liabilities.

t has made plain that "[t]he starting point in volving construction of a statute is the language s Court has also made clear that if the statutory ich is alleged to give rise to an unexpressed civil ot drafted with "an unmistakable focus on the ss," or if the provision simply "create[s] duties f persons for the benefit of the public at large," le reason to infer that Congress intended to vate right to damages on individuals. *Cannon,* 91, 692 n.12; *Universities Research Association, u,* No. 78-1945, slip op. at 17 (U.S., April 6, *Redington,* 442 U.S. at 569.[9] None of the sec- CEA relied on by respondents in these cases vith "an unmistakable focus on the benefited eed, each of the sections was enacted for the protection of the general public, not for the particular group. *See* Judge Mansfield's dissent 208.

makes it unlawful for brokers in or in connection "for or on behalf of any other person . . . (A) to

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rnst v. *Hochfelder,* 425 U.S. 185, 197 (1976); *Trans-* J.S. at 16; *Redington,* 442 U.S. at 568; *Southeastern ollege* v. *Davis,* 442 U.S. 397, 405 (1979); *Cannon,* 89.

e Congress clearly intended to impose duties for the ticular class of persons, however, the question whether intended to create a private right in those persons nswered. *Transamerica,* 444 U.S. at 17-18 ("Indeed, lative history leaves no doubt that Congress intended rceable fiduciary obligations. [citations] But whether ded additionally that these provisions would be enforced e litigation is a different question."); *Coutu,* slip op. *is* v. *Passman,* 442 U.S. 228, 241 (1979).

cheat or defraud . . . such other person . . ." (B) willfully to give "such other person any false report . . . or (C) willfully to deceive . . . such other person." (7 U.S.C. §6b). The offense thus exists only when the broker cheats or defrauds *his* customer. Nowhere does the section mention parties having no connection with the contract. In face of this language, no possible claim can be made that respondents, non-customers of these petitioners, were members of the class for whose especial benefit this provision was enacted. See Judge Mansfield's dissent at J.A. 192-96.

Section 9(b) makes it a felony "for any person to manipulate . . . the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market or to corner . . . any such commodity." (7 U.S.C. §13(b)). As Judge Mansfield points out in his dissent:

> ". . . §9(b), like §4b, does not disclose any desire to benefit a special class of which plaintiffs are members. When read in the light of the Act's overall purposes it appears to have been enacted for the benefit of the public, including producers and consumers of commodities, not that of speculators or investors. . . . [T]here is not the slightest suggestion in the language or legislative history of §9(b) that Congress impliedly intended it to be enforced by private civil suits for damages. The remedies provided by Congress are found elsewhere in the Act." (J.A. 207-08).

Similarly, Section 4a is a general prohibition against excessive speculation in futures trading. This provision was surely not intended as a special protection for those same speculators against whose activities it was directed. *Liang* v. *Hunt*, 477 F.Supp. 891, 893 (N.D. Ill. 1979) ("The legislative history provides no mention of any remedy nor any intent to benefit speculators"). *See Piper*, 430 U.S. at 37; *Santa Fe Industries, Inc.*, 430 U.S. at 478. As Judge Mansfield wrote in his dissent:

as ever found a private cause of action to
4a. The section serves as a general prohibi-
excessive speculation in commodity futures
in language of the section, then, indicates
designed for the protection of the general
is there any suggestion that Congress in-
nfer any private right of action upon any
lone a speculator, who might be claimed to
as a consequence of a violation of the sec-
207-08 n.8).

ections simply proscribes certain conduct.
ctions in terms creates or alters any civil
merica, 444 U.S. at 19.

pinion attempts to show that although the
Congress was to restrict those speculators
he grain trade to the detriment of the pro-
onsumer" (J.A. 130), Congress had grad-
that "speculators" also deserved to be
131-35), and hence were within the class
traders" intended to be "specially bene-
). But this has little to do with the 1936
fore the Court. The Court has warned
ing causes of action "to serve what is 'at
purpose' of the federal legislation." *Santa*
c., 430 U.S. at 478.

and 9(b) are criminal sections which when
nishable by fines and imprisonment. As early
urt pointed out, with respect to Section 3
Patman Act:

3 contains only penal sanctions for violation
ions; in the absence of a clear expression of
l intent to the contrary, these sanctions
familiar principles be considered exclusive,
supplemented by civil sanctions of a distinct
shville Milk Co. v. *Carnation Company*, 355
7 (1958).

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shville Milk remains sound law
own, 441 U.S. 281, 316 (1979),

66 (1975), we noted that this
a private right of action under

**) Were Enacted In 1936 and
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a Commission could suspend
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the Secretary of Agriculture
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the statute.[11]

he Commodity Exchange Act
t. 1491) which substantially
ct. Sections 4a, 4b and the rel-
of current Section 9(b)[12] were

21, substantially re-enacted as the
nended and renamed in 1936, was
passed the Packers and Stockyards
2 Stat. 159). Section 308 of that
or damages in the federal district

), 6(b); 42 Stat. 999, 1001, 1002

age of current Section 9(b)—"or
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2 U.S. at 575 n.16;
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[14] In nearings befo
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and H.R. 13113 Befo
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[15] Under these amen
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At no point in this scheme has
private right of action for damag
Given the remedies available unde
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The very enactment of these expr
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> "A frequently stated principle
> is that when legislation expres
> remedy or remedies, courts sh
> age of the statute to subsume
> at 458.

See *Transamerica*, 444 U.S. at 19-2
T.I.M.E., Inc. v. *United States*, 3
Botany Worsted Mills v. *United*
(1929). But other evidence sugge
edies were to be exclusive. Secti
plaints are to be screened by the

(footnote continued from previous page)
FCM for damages. This reparations p
the filing of a "petition" within two y
accrues. The Commission reviews the
and if "in the opinion of the Commiss
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Commission to the respondent for satis

If the FCM is found to have violate
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may, within three years of the date of th
the federal district court in the district i
is located the principal place of business
if an appeal is not taken and the ord
days of the compliance date, the FCM
suspended. *See* 7 U.S.C. § 18.

tions proceeding is commenced. While th
mysteriously reasons that the lack of ar
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such actions, the proper inference to be
provision is precisely to the contrary. Wh
have provided for specific procedures i
those procedures could be avoided merel
of an alternate forum? This point is fu
by Section 14 of the CEA which provid
year limitations period applicable to
CEA. If reparations were intended to
to court actions this uniform limitations
meaningless. *See Oscar Mayer & Co.* v. *Et*
763 (1979). In addition, an implied private
inconsistent with the Section 14 requireme
dent of the United States post a bond "bef
tion is taken on his complaint." No such
generally in the federal courts.[16] Similar
quires a losing party to reimburse attorne
costs paid by the prevailing party in enfor
district court. No such award may be en
federal court judgments. Finally, the CFT
rations awards, but of course not judgments
to assure uniformity in the development
governing the futures industry as part of
"to strengthen the regulation of futures t

**B. Congress Considered but Refused
Which Would Have Created a
Action for Damages.**

At the time of the 1974 amendments, C
a bill which would have provided for both

[16]The Court has recognized that such require
protection against "strike" suits and other types
Blue Chip Stamps v. *Manor Drug Stores*, 42
(1975).

damages ("Civil Action for Damages" S. 2837 §505). bill would have created a private right of action in federal courts for parties injured by violations of the Congress rejected this approach in favor of the more det administrative scheme described above. In *Amtrak*, 414 453 (1974), this Court considered legislative history in v a proposed amendment creating an explicit private rig action in the district courts was similarly rejected. Court held that the failure of the Committee to adop proposal was "substantial indicia" that the legislator not intend the final version of the bill to create a pr right of action in the district courts.[17] *Id.* at 460-61.

The majority speculates that Congress failed to adop private right of action provision because of an unwilling to adopt the treble damage provision and because "[s]i damages were recoverable under existing law." (J.A. n.38). This contention seriously underestimates the al of Congress to create legislation that specifically re its intent. ". . . [I]f Congress intends those custome have such a federal right of action, it is well aware of it may effectuate that intent." *Redington*, 442 U.S. at Congress is unlikely to have rejected a provision cre a private right of action if it actually intende

[17] In these cases, the Senate Committee on Agriculture and For which held hearings on H.R. 13113 and the three Senate bills, S. S. 2578, and S. 2837, for eight days during which time it heard 58 witnesses and reviewed written statements from 18 other pa stated in its report that:

> "It . . . considered the differences between the provisio the various Senate bills and the House bills, as well as all an ments which had been submitted by interested parties.
>
> "The Committee proceeded gingerly and with caution efforts to rewrite the legislation regulating such an impo industry as commodity futures trading." S. Rep. No. 93- 93d Cong., 2d Sess. 20 (1974).

Congress' failure to pass the bill creating a private cause of a was clearly a studied omission.

eate such a right of action, especially given the likely inter-
etation of that rejection by the courts in light of the then
cent decision in *Amtrak*. Moreover, if "simple damages
re recoverable under existing law," why would Senator
art have proposed a bill providing a right to such dam-
es?

C. The Plethora of Other Judicial and Administrative Remedies Expressly Provided in the CEA Is Compelling Evidence That Congress Did Not Create an Unexpressed Right of Action for Damages.

The CEA provides not only fines and imprisonment for
olation of Sections 4a, 4b and 9(b) (7 U.S.C. §§ 13(b) and
(c)), but other judicial and administrative means of en-
rcement as well. For example, the CFTC is authorized to
ohibit FCMs such as these petitioners from trading on
y contract market, to suspend or revoke the registration
an FCM, to assess civil penalties of up to $100,000 against
FCM for each violation of the CEA (7 U.S.C. § 9), to
spend or expel from membership in a commodity exchange
otherwise discipline members of a commodity exchange
U.S.C. § 12c(1)(A)), to review, affirm, reverse or modify
tion taken by a commodity exchange against its members
U.S.C. § 12c), to commence suit in the district courts
ainst FCMs and others for a restraining order, an in-
nction or a writ of mandamus (7 U.S.C. § 13a-1), and to
nduct such investigations as it deems necessary to as-
rtain facts regarding the operations of boards of trade
d other persons (7 U.S.C. § 12(a)). Any person complain-
g of any violation of the CEA may commence an admin-
rative proceeding against an FCM to recover damages
th awards enforceable in the district courts (7 U.S.C.
8). See, in addition, 7 U.S.C. §§ 7a(11) and 21(b)(10).
ates are authorized to bring suits in equity and actions
law for injunctive relief, damages or such further and

ef as the court may deem appropriate (7 U.S.C. These are merely some of the enforcement mecha- tained in the CEA. What was said in *Trans-* applies with even greater force in these cases:

> it is an elemental canon of statutory construction where a statute expressly provides a particular ly or remedies, a court must be chary of reading s into it [citations]. . . . Congress expressly pro- both judicial and administrative means for en- ng compliance with § 206. . . . In view of these ss provisions for enforcing the duties imposed by it is highly improbable that 'Congress absent- edly forgot to mention an intended private ac- *Cannon* v. *University of Chicago*, 441 U.S. at 742 ell, J., dissenting)." 444 U.S. at 19-20.

ntrak, 414 U.S. at 452; *Botany Worsted Mills* v. *ates*, 278 U.S. 282, 289 (1929).[18]

1978 AMENDMENTS TO THE CEA PROVIDE THER EVIDENCE THAT CONGRESS NEVER ENDED TO CREATE AN UNEXPRESSED HT OF ACTION FOR DAMAGES UNDER SEC- NS 4a, 4b and 9(b).

, Congress again amended the Commodity Exchange again chose not to make provision for private dam- ons in the federal courts. (Futures Trading Act of . L. No. 95-405, 92 Stat. 865). In the hearings on amendments, Senator Huddleston noted that as of the 1974 amendments the courts were refusing a private right of action under the CEA. 124 ec. 10537 (1978) (remarks of Sen. Huddleston). as the District Court correctly pointed out, Con-

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[18] *Goldman* v. *First Federal Savings & Loan Ass'n of Wil-* F.2d 1247, 1250 n.6 (7th Cir. 1975):

> e statute expressly authorizes proceedings to enforce its ions and the regulations promulgated under it, ordinarily be inferred that no other means of enforcement, such as ivate cause of action, was intended by the legislature. ions]" (per then Judge Stevens.)

despite this criticism, chose not to provide a cause of in the federal courts.[19] Instead, Congress strengthened parations proceedings and expressly authorized State ls to bring injunctive and damages actions in the l courts (7 U.S.C. § 13a-2). Congress expressly pro- the federal courts with jurisdiction over such actions .C. § 13a-2(2)). This express provision for state civil s is, as this Court stated in *Transamerica*, 444 U.S. n.13, "another clear indication that Congress knew o confer a private right of action when it wished so."[20] Equally important was Congress' determina- o assure that such actions would not proceed without ission involvement:

Immediately upon instituting any such suit or action, he State *shall serve* written notice thereof upon the Commission and provide the Commission with a copy of ts complaint, and the Commission shall have the right to A) intervene in the suit or action and, upon doing so, hall be heard on all matters arising therein, and (B) le petition for appeal." 7 U.S.C. § 13a-2(3); emphasis dded.

Congress took steps to guarantee to the extent possible nal uniformity in the development of standards govern- ommodity futures trading.[21]

---

lthough the Senate report on the 1978 amendments to the CEA catalogs the protections provided customers under the CEA, con- usly absent is any mention of an implied right of action for ges. S. Rep. No. 95-850, 95th Cong., 2d Sess. 12-13, 32 (1978); *vers* (J.A.S. 32a).

ee *Alkan* v. *Rosenthal & Co.*, 2 Comm. Fut. L. Rep. (CCH) 97 at 23,252 (S.D. Ohio. 1979), citing *Berman* v. *Bache, y, Stuart, Shields, Inc.*, 467 F.Supp. 311 (S.D. Ohio 1979) . . [T]he legislative history of the 1978 amendments implies gly that no private cause of action exists."). *See also Bartels* v. *ational Commodities Corp.*, 435 F.Supp. 865 (D. Conn. 1977).

ee H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. 14, 16 (1978).

(footnote continued on next page)

**RITY ERRED IN RULING THAT, BE-
IGRESS IN 1974 FAILED EXPRESSLY
L THE CAUSE OF ACTION FOUND TO
D IN CERTAIN PROVISIONS OF THE
NUMBER OF LOWER COURTS, IT *SUB*
APPROVED AND ADOPTED THESE
S DECISIONS.**

ompletely ignores the principles governing
ivate remedies established by this Court.
ity erroneously chose to rely on the "canon
truction that the reenactment of a statute
eding judicial interpretations," citing *Van
ering*, 115 F.2d 709, 710 (2d Cir.), *cert.*
585 (1940), and several other irrelevant
144).

ontends that Congress was aware in 1974
er federal courts had implied a private
r damages in several provisions of the CEA
s' failure in the face of these decisions to
e enunciated therein is evidence of an in-
to approve and adopt the rule. (J.A. 127-
er these circumstances, the majority would
tioners here an "exceedingly strong show-
n to abolish the private cause of action for
ion and violations by exchanges that had
recognized in order to justify a conclusion
gress' intent." (J.A. 146).

from previous page)
o Congress of assuring a nationally uniform body
ner emphasized by its refusal to permit the States
State courts under State statutes identical to the
ge Act:

ittee was concerned that, despite safeguards in the
ility existed that in time there would be separate
e court decisions among the various States that
nfusion and disruption among the regulated per-

utory construction, the pre-
ption of prior judicial in-
s helpful in resolving ambi-
rom conclusive. This Court
"the doctrine of legislative
n auxiliary tool for use in
y provisions." *Jones* v. *Lib-*
3-34 (1947).[22]

out in his dissent (J.A. 246-
majority do not support its
circumstances of these cases.
ed private rights of action.
ply the canon to reach their
lying the canon to interpret
congressional awareness of
on.[24] And all of the cases
o in an attempt to ascertain

U.S. 428, 432 (1941); *FCC* v.
California, Inc., 311 U.S. 132,

, 115 F.2d 709, 711 (2d Cir.),
e court rejected application of the
important" factors. In *Georgia* v.
1973), the Court, as a matter of
ier interpretation of identical lan-
decision on the presumption that
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U.S. 575, 581 (1978), the Court
"a detailed knowledge of the . . .
acted language. In *Georgia*, 411
at the prior judicial interpretation
Congress. *See* Judge Mansfield's
nett v. *Panama Canal Co.*, 475
the court stated that Congress re-
ss" of the prior interpretation and
proval follows "from reenactment
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ad been adopted by

Contrary to Fact, ted" the Relevant Doing Incorporated on" Upholding Im- es.

974 amendments to ' of the provisions are claimed by re-

89, enacted October of amendments and s a "re-enactment" ained no "re-enact- ns 4a, 4b and 9(b). he 1974 legislation; ts base their claims jority admits (J.A. ions were left un-

tion, ignored by the he mere amendment ng the canon of con- *ing* v. *Hallock*, 309 said:

he doctrine that re- cts a settled judicial

the words "standards, s Acts of 1965; *Loril-* egal relief" in the Age *Bennett*, 475 F.2d at intended as permissive *Co.* v. *Shimadzu*, 307 eaning of the statutory

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The requirement of
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[31] *Jones* v. *Liberty G*
not expect Congress to
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Welden, 377 U.S. 95,
Club, 315 U.S. 32, 40

force in these cases where the h
cases are not only in error but in
stitutional principles. The major
the basis of congressional silence
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**E. The Majority Erred in Hol
gress Consciously Decided
Interpretation Had Recogn
Action for Damages Under
and Intended to Preserve a**

Even if the pre-1974 cases relied
been sufficient in numbers, sufficie
adequately reasoned to support a
was "settled" law, the canon relie
applied if there is a clear showin
(1) knew about those decisions,
state a definite and conclusive in
(3) regarded them as upholding
those asserted in the present cas
assumptions.[32] Every case cited b
the canon to construe ambigu
supported its decision with cle
sional awareness of the prior
ample, in *Georgia* v. *United S*
n.5 (1973), this Court cited at
gressional discussion and cons
prior interpretation.

**1. No clear evidence suppo
1974 Congress was aware
believed that the existence**

[32] *See SEC* v. *Sloan*, 436 U.S. 103,
Board of Commissioners of Sheffield
(1978); *City of New York* v. *Sape*
Zenith Radio Corp. v. *Hazeltine Re*
(1971); *Jones* v. *Liberty Glass Co.*,
Girouard v. *United States*, 328 U.S.
Reynolds, 313 U.S. 428, 432-33 (194

> of action for damages had been "
> erroneous pre-1974 decisions, or tha
> proved and affirmatively enacted the
> erroneous decisions.

In support of its assertion of "the se
that [the 1974] Congress knew the cour
ing private rights of action" (J.A. 141), the
almost exclusively on a few statements scatte
House Report and House debate which se
the effects of private actions against exchange
These isolated references to private actions a
provide no evidence that Congress was awa
tions against *brokers* under Sections 4a, 4b a

In addition to the criticisms of private act
changes, the majority points to a small nu
references to unidentified lawsuits and to c
the House hearings to the fact that com
access to the courts. (J.A. 142). The most
for these vague references is that they infe
that market participants and contract m
immune from lawsuits. With the excepti
reference to *Deaktor* in a letter to a House C
is no evidence that Congress was aware of
1974 cases or any other lawsuit brought und
of the CEA. But in any event the assertion
isolated and undocumented references are
tablish that Congress was aware of, duly
approved the construction given various p
CEA by some lower federal courts is wholly
SEC v. *Sloan*, 436 U.S. at 121; *Rivers* (J
Judge Mansfield points out in his dissent

> "The legislative history of [the 1974
> which runs into hundreds of pages of co
> testimony and debates, fails to contai
> proving a private right of action, desp
> a couple of witnesses and a Senator
> (J.A. 174-75).

The majority places great reliance on the proviso of S 2(a)(1) of the CEA as support for its contention that th Congress approved the private rights of action which ha erroneously implied prior to 1974. (J.A. 152-56). Thi viso reads: "Nothing in this section shall supers limit the jurisdiction conferred on courts of the U States or any State."

As Judge Mansfield points out (J.A. 236-40), this ment is a plain distortion of the legislative record. gressman Rodino—the sponsor of the proviso—made in his Senate testimony that the provision was intend preserve federal and state courts' jurisdiction to hear c which did not arise under the CEA such as ordinary co claims or actions for violation of other federal statutes ticularly, the anti-trust laws. In addition, Congres Rodino was concerned that Section 201 of the bill, as w might bar judicial review of CFTC decisions on comm matters. As Judge Mansfield wrote:

> "Given the reasons expressly advanced by Cha Rodino and given that no witness indicated that t vision of §201 was intended to preserve or even any private rights of action in federal courts, th dence is overwhelming that Congress simply took u task of correcting the problem noted by Chairman R and others and had no intention of approving a p damage action. Had Congress intended to preserve diction of the federal courts over private suits it easily have said so, as it did in §6c when it granted fe jurisdiction to hear CFTC-initiated injunctive suit in §14(f) when it provided for such jurisdiction t force judgments arising out of reparations proceedi (J.A. 239).

Moreover, this argument confuses the question wh respondents have an implied cause of action for dam under the CEA with the question whether the federal c have jurisdiction to hear any cause of action under the *See Burks* v. *Lasker*, 441 U.S. 471, 476 n.5 (1979) (

question whether a cause of action exists is not a question of jurisdiction. . . .") Even assuming *arguendo* that the majority's contention relating to the preservation of jurisdiction is correct, whether pursuant to congressional design the respondents have an implied cause of action for damages under the CEA is a different question:

> "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition *who may enforce them and in what manner.* For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms, such as criminal prosecutions . . . or other public causes of actions. [citations] In each case, however, the question is the nature of the legislative intent informing a specific statute. . . ." *Davis* v. *Passman,* 442 U.S. 228, 241 (1979).

As this Court emphasized in *Redington,* 442 U.S. at 577, a jurisdictional provision: "creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision." *See Amtrak,* 414 U.S. at 455-57 ("In terms, §307(a) purports only to confer jurisdiction, not to create a cause of action.").[38]

2. There is no evidence that Congress intended to incorporate a private right of action in the CEA by

[38] The majority relies on certain statements of Senator Dick Clark and law professor Roy A. Schotland in arguing that this proviso was intended to preserve the implied right of action which some courts had incorrectly read into the Act prior to 1974. (J.A. 143-44). However, citation of these statements only underscores the fact that Congress specifically chose not to provide such a right. Mr. Schotland's statement calls for "explicit language" establishing a private right of

(footnote continued on next page)

rence to the Securities Acts especially in view he fact that key provisions in those Acts were rely omitted from the CEA.

ority opinion asks whether "Congress was not assuming" that the decisions under the securities ng private rights of action "would be followed t to the CEA."[34] (J.A. 116). Asserting that from into the 1970's "there was widespread, indeed al- al, recognition of implied causes of action for nder many provisions of the Securities Exchange 113), the majority invokes *Cannon*, 441 U.S. at the proposition that the "evaluation of congres- on . . . must take into account its contemporary t." (J.A. 157).

however, concerned Title IX of the Education ts of 1972 which was intentionally patterned after the Civil Rights Act of 1964 which had been in- as providing a cause of action ("We are only 3 letter word 'sex' to existing law." 117 Cong. (remarks of Senator Bayh)). As Justice Stevens he drafters of Title IX *explicitly assumed* that e interpreted and applied as Title VI had been

ntinued from previous page)

enator Clark's statement expresses the hope that both the ressed by Congressman Rodino and the failure to provide ights of action "can be corrected in the Senate." A fair e proviso as enacted demonstrates that Congress took up rrecting the problem pointed out by Congressman Rodino ng to go further to provide for private damages actions.

ongress may have been justified in assuming is, of course, The germane inquiry is what Congress in fact assumed l. "[W]hat must ultimately be determined is whether tended to create the private remedy asserted." *Trans-* U.S. at 15-16.

" *Cannon*, 441 U.S. at 696 (emphasis added).[35] Indeed, evidence of legislative intent was so "compelling" that Court had "no hesitation in concluding that even the test used by Mr. Justice Powell . . . is satisfied in this case." at 703 n.34). *Cannon* specifically disavows reliance on a umption that the "legal context" justified congressional f that a cause of action would be inferred by the courts refers only to analogous legislation which had been duly idered by Congress.

it the Congress in 1974 gave no indication that it ex- ed the CEA to be interpreted, with respect to the issue ctions for damages, by analogy to the Securities Acts. eover, Congress had no reason to believe that the reason- of the cases decided under the Securities Acts applied to CEA. See pages 22 to 24 of this brief.

ntral to the "contemporary legal context" of decisions ying private rights of action under the Securities Acts d upon by the majority is the now discredited notion "it is the duty of the courts to be alert to provide remedies as are necessary to make effective the con- sional purpose." *J. I. Case* v. *Borak*, 377 U.S. at 433. he 1974 Congress is to be presumed to have considered "contemporary legal context" in enacting the CEA, it t also be presumed to have understood that this context luded the implication of a right of action for damages re any need for such a remedy was *expressly* satisfied.[36] eover, as Judge Mansfield points out, the "contemporary l context" with respect to the willingness of federal

---

Justice Stevens further pointed out:

"because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX." *Cannon*, 441 U.S. at 697-98.

See pages 30 to 31 of this brief.

private rights of action was not at all

ity overstates the extent to which courts
mplying causes of action, ignoring such
eeldin v. *Wheeler*, 373 U.S. 647 (1963);
. v. *United States*, 359 U.S. 464 (1959);
Dakota Utilities Co. v. *Northwestern Public*
341 U.S. 246 (1951); *General Committee* v.
., 320 U.S. 323 (1943); *General Committee*
Pacific Co., 320 U.S. 338 (1943); *Switch-*
v. *National Mediation Board*, 320 U.S. 297
which rejected such claims of private rights.
the area of securities, the courts denied
s of action. *E.g., Colonial Realty Corp.* v.
., 358 F.2d 178 (2d Cir.), *cert. denied*, 385
966); *O'Neill* v. *Maytag*, 339 F.2d 764 (2d
(J.A. 217).

addition to *Amtrak, supra*, which was de-
nactment of the 1974 amendments, demon-
ontemporary legal context, even if consider-
ongress, was not so uniform and compelling
Congress reason to assume that the federal
ndertake to supply a private right under
in any event the federal courts are not
n fact are constitutionally prohibited from
gress in its refusal to confront these hard
non, 441 U.S. at 743 n.14 (Powell, J., dis-

974 Congress did not assume or approve of
ce of private causes of action is demon-
the actions which it took.

ted at pages 24 to 31 of this brief, the
the CEA enacted in 1974 are clearly in-
an intent to approve a private right of
ges.

CLUSION

at the decision of the Court below
se of action for damages against
nts exists under Sections 4a, 4b
Exchange Act is erroneous and

Respectfully submitted,

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Counsel for Petitioners

nold Commodities, Inc.

, CLARK & MURRAY

nson & McKinnon
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No. 80-936
(Consolidated with Nos. 80-757 and 80-895

IN THE

Supreme Court of the United States

October Term, 1980

HEINOLD COMMODITIES, INC., THOMSON & McKINNON AUCHINCLOSS KOHLMEYER INC.,
Petitioners

v.

NATIONAL SUPER SPUDS, INC., *ET AL.*,
Respondents

BRIEF OF RESPONDENTS NATIONAL SUPER SPUDS, INC., ET AL.

STATUTORY PROVISIONS INVOLVED

Sections 4b and 9(b) of the Commodity Exchange Act, as amended (7 U.S.C. §§6b and 13(b), are set forth in Petitioner's Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

The Statement of the Case of Petitioners Heinold Commodities, Inc. and Thomson & McKinnon Auchincloss Kohlmeyer Inc. is adopted except insofar as supplemented or modified hereby.

While it is accurate that neither of the Petitioners herein acted as broker for Respondents, it must be noted that Petitioners represented short sellers and that it is from this relationship that the assertion of liability under Section 4b and 9(b) of the Commodity Exchange Act arises.

While it is, perhaps, true that Respondents' claims for damages could have been presented through the administrative proceeding available under the Commodity Exchange Act, no defendant in the proceedings below has ever raised the objection that Respondents have failed to exhaust their administrative remedies.

SUMMARY OF ARGUMENT

Although the Commodity Exchange Act was extensively amended in 1974, the Court of Appeals for the Second Circuit found that Congress fully intended private damage remedies to be continued, even in the absence of Congress' express mandate. Of crucial significance to the Court below was the fact that prior to 1974, implied private remedies under the Act had been unanimously approved by a large number of federal courts, and the fact that Congress in 1974 was fully aware of that approval. The Second Circuit was therefore of the view that the question of whether Congress meant to *create* private rights in 1974 was not at issue. Rather, the appropriate form of inquiry was whether it was Congress' intent that these private rights be continued.

Recent decisions by this Court have modified the traditional approach for determining if private remedies ought to be implied under federal statutes. The Court below, in line with these decisions, determined that the critical element which must be found, according to this Court's recent holdings, is that of legislative intent. This

element must be present not only in the language and focus of the statute and its legislative history, but it also must be reflected in the underlying purposes which the statute seeks to achieve. The analysis of Congressional action in 1974 demonstrated that the requisite intent was apparent in all these factors. The Court below found that there were numerous indications throughout the legislative history that Congress meant these rights to be continued. The jurisdictional savings clause, among other convincing evidence, offered strong support for the finding that Congress did not desire to tamper with these rights.

In reaching its conclusion, the Second Circuit was guided by time-honored principles of statutory construction. One of these, the doctrine of re-enactment, provides that when the legislature re-enacts a statute, accepted judicial interpretations of statutory provisions are incorporated into that statute. In 1974, Sections 4b and 9(b) of the Commodity Exchange Act were incorporated into the amended statute in substantially the same form as they had appeared under the Commodity Exchange Act. Moreover, nowhere on the face of the statute or in the entire body of legislative history is there any indication whatsoever that Congress disapproved of the prior interpretation of these provisions which had implied private remedies.

It was the stated position of the Court below that Congress' awareness in 1974 of the existence of private remedies created a strong presumption that it meant these rights to continue. In the absence of any evidence of clear legislative intent to the contrary, the Second Circuit ruled correctly that the 1974 Congress did not mean to abrogate the private causes of action which already existed.

ARGUMENT

I.

The Proper Frame of Inquiry Is Whether the 19 Amendments Manifested an Intent on the Part Congress to Nullify Existing Implied Private Re edies Under the Commodity Exchange Act.

In the period preceding the 1974 Amendments to t Commodity Exchange Act, (the "CEA") all the cou which considered the question of whether a priva cause of action existed under the Act "apparently u formly concluded that such an action exists." *Deaktor L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7th Cir. 197 *rev'd on other grounds sub nom., Chicago Mercant Exchange v Deaktor*, 414 U.S. 113 (1973). Indeed, t prevailing status of the law at the time Congress enact the Commodity Futures Trading Act (the "CFTCA" was such that it was "undisputed that a private cau of action may be maintained under the Commodity E change Act." *Case & Co., Inc. v Board of Trade of t City of Chicago*, 523 F.2d 355, 360 (7 Cir. 1975).

The first reported decision which recognized an i plied private remedy was *Goodman v H. Hentz Co.*, 2 F.Supp. 440 (N.D.Ill. 1967). *Goodman* was followed by long line of decisions in which the implied remedy ceived unanimous endorsement from more than a "f federal courts."[2]

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1. Commodity Futures Trading Act, Pub.L.No. 9 463, 88 Stat. 1389, *et seq.* (1974)

2. Petitioner's statement that private remed were implied by a "few federal courts prior to 1974" misleading. (Brief of Petitioner Clayton Brokerage C of St. Louis, Inc., p. 44.) See *Hirk v Agri-Research Cou cil, Inc.*, 561 F.2d 96 (7th Cir. 1977); *Case & Co., Inc*

Although the majority of these cases found
vate remedy under Section 4b in a broker-client
tion, none of the decisions limited liability either
broker-client relationship or to the anti-fraud prov
of the Act. In *Deaktor,* the Court of Appeals f
Seventh Circuit held that plaintiff traders had a p
damage action against an Exchange for a violat
the anti-manipulation provisions of the Act, S
9(b), 7 U.S.C. 13(b). 479 F.2d at 534.[3]

The widespread judicial recognition which w
forded to the existence of an implied private rem
all the pre-Amendment cases makes it fitting to
the judicial precept that "Congress is presumed
aware of an administrative or judicial interpretat
a statute . . ." *Lorillard v Pons,* 434 U.S. 575, 580 (
or equally "appropriate to assume that our electe

Board of Trade of the City of Chicago, 523 F.2d 35
Cir. 1975); *Deaktor v L. D. Schreiber & Co.,* 479 F.
(7th Cir. 1973); *Booth v Peavey Company Comm
Services,* 430 F.2d 132 (8th Cir. 1970); *Bartley v.
Commodities Associates Inc.,* CCH Com. Fut. L
¶20,123 [1975-1977 Transfer Binder] (S.D. N.Y. 1
Seligson v New York Produce Exchange, 378 F.
1076 (S.D.N.Y. 1974); *Arnold v Bache & Co., In
F.Supp. 61 (M.D. Pa. 1973), Johnson v Arthur
Shearson, Hamill & Co.,* 341 F.Supp. 764 (S.
1972); *Gould v Barnes Brokerage Co., Inc.,* 345 F
294 (N.D. Tex. 1972); *McCurnin v Kohlmeyer & C
F.Supp. 1338 (E.D. La. 1972), aff'd,* 477 F.2d 11
Cir. 1973); *United Egg Producers v Bauer Int'l
311 F.Supp. 1375 (S.D.N.Y. 1970); *Anderson v Fra
duPont & Co.,* 291 F.Supp. 705 (D.Minn 1968); and
man v H. Hentz & Co., 265 F.Supp. 440, (N.D.Ill.

3. See *Case & Co., Inc. v Board of
Chicago,* 523 F.2d 355; *United Egg Producers v
International Corp.,* 311 F.Supp. at 1384; *Seligson
York Produce Exchange,* 378 F.Supp. at 1084.

resentatives, like other citizens, know the law
v University of Chicago, 441 U.S. 677, 696-69
Moreover, since the current status of the la
peatedly brought to Congress' attention,[4] ther
justification to presume that in 1974 Congres
only aware of the prior interpretation of the
that "that interpretation reflects their inten
spect to [the CFTCA]." *Cannon v University o*
441 U.S. at 697-698.

It is not in the least surprising that the S
cuit found that, in the fact of Congressional
1974, an implied private remedy was "imp
proved" (JA 128), and that given the current
the law and Congress' knowledge of that st
burden thus lies on those who urge that the 19
ments demonstrate an intention to change pri
. . . that, on making the changes it did Congre
mindedly forgot' to repeal the private cause
[JA 128, quoting Justice Powell's dissent ir
University of Chicago, 441 U.S. at 742].

Thus, the proper framework of the prese
as correctly stated by the Court below, is not
was Congress' intent to create a private caus
in 1974, but whether Congress, through its
tended to *abolish* any existing right in the
making other changes in the Act. (JA 127)
v Lerner, 485 F.Supp. 871, 875 (D.N.J. 1980

The question of whether Congress intende
an express or implied cause of action is a q
statutory construction *Transamerica Mort*
visors, Inc. v Lewis, 444 U.S. 11 (1979). Statu
ciples are likewise applicable where the cruci

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4. See pp. 14-15 *infra.*

is whether Congress intended to abolish ated private rights through the subsequ of a statute. The ruling by the Second Cir gress' silence in 1974 demonstrated appro tinued existence of implied private remed ent with a cardinal rule of statutory cons Court has ruled on numerous occasions th peals of pre-existing rights should not b ought not to be found in the absence of gressional intent to repeal those rights o able conflict between the prior law and th See *Tennessee Valley Authority v Hill,* 437 190 (1978); *Morton v Cancari,* 417 U.S (1974), *Posadas v National City Bank,* 29 (1936). Nor has this principle been limit cation to situations involving express sta This cardinal rule has also been applied i cide whether Congress, by enacting a stat repealed judicially recognized common la cordingly, this Court ruled that implied only be found where

> "... that result is imperatively requi say, unless it be found that the pre-ex so repugnant to the statute that the st right would in effect deprive the subs of its efficacy."

Texas and Pacific Railway Co. v Abilene 204 U.S. 426, 437 (1907); See *Nader v A lines, Inc.,* 426 U.S. 290, 298 (1976).

Far from depriving the Act "of its effi tinued existence of private damage actions ly constistent with the express remedial p vided for future traders, i.e. Commission r ceedings and contract market arbitratio

Private actions also serve a useful funct
trader protection, a fundamental pur
Moreover, the Commodity Futures Tra
(the "Commission") has not found a
among these three rights which, in its v
commodity traders an election of rem
See 41 *Fed.Reg.* 3994 (1976); 41 *Fed.*
(1976); *Stucki v American Options Co*
Fut.L. Rep., ¶20,559 at 22,283 (CFTC,

Some courts which have concluded
below, that private causes of actions h
1974 Amendments, found it unnecess
analysis set forth in *Cort v Ash,* 422
where the survival rather than the cre
cause of action was at issue. See e.g. *
Whittier & Co., Inc., 459 F.Supp. 733
Jones v B. C. Christopher Co., 466
Kansas). The Court below, however, w

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5. The interpretation of a statu
charged with its administration is ent
able deference. *Udall v Tallman,* 380 U.S

In "Statement of the CTFC Conce
Private Litigation under the Doctrine
diction," the following is indicative of
view:

> "On the other hand, private litigat
> ages for alleged violations of prov
> will rarely, if ever, involve issue
> review by the Commission under th
> mary jurisdiction. The judicial re
> vate fraud action, for example,
> application of specific statutory
> particular conduct alleged. The is
> particular fraudulant scheme, how
> are entirely within the conventio
> Courts to resolve . . ."
> 41 *Fed. Reg.* 18472 (May 5, 1976).

that the enactment of the CFTC
plete overhaul of the Act" (JA 111
it appropriate to apply the more
Cort test rather than to rely ex
sumption that long-standing judi
plied private remedies are meant
affirmative expression of a contr
Accord Smith v Groover, 468 F.Su
Nevertheless, the attention given
to the unqualified judicial approv
age remedies prior to 1974 canno
observed that

> "When a principle has become
> decisions, there is no occasion
> unless it wishes a change." (J

The Court's conclusion that imp
continued to survive was warra
analysis as it has recently been re
Cannon v. University of Chicag
Touche Ross & Co. v. Redington, 4

II.

**Plaintiffs Are Members of the Cla
Benefit' the Commodity Excha**

The focal inquiry here und
analysis is whether Congress int
edy. See *Touche Ross & Co. v Redi*
Transamerica Mortgage Advisors
The first three *Cort* factors—"the
the statute, its legislative histor
are traditional indicators of legi
Ross, 422 U.S. at 575-576. Thus, a
inquiry is whether the statutory p

for the benefit of a special cla
is a member," *Cannon v Univer*
at 689; that is, whether the st
conduct or created federal right
ties." *Touche Ross & Co. v Redi*

The plaintiffs are traders
commission merchants ("FCM
fraud provisions of Section 4b
and the prohibition against ma
tion 9(b), 7 U.S.C. Section 13

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6. Section 4b provides in p
"It shall be unlawful (1)
tract market, . . . in or in c
to make, or the making of
any commodity . . . for or
or (2) for any person, in
order to make, or the ma
sale of any commodity for
on behalf of any other pers

> (A) to cheat or defra
> defraud such other pe
> (B) willfully to mak
> such other person any
> thereof, or willfully t
> tered for such person
> (C) willfully to decei
> such other person by
> regard to any such
> disposition or executi
> contract, or in regar
> performed with respe
> tract for such person;"

7. Section 9(b) provides

"It shall be a felony p
more than $500,000 or im
than five years, or both, t
prosecution, for any pers
tempt to manipulate the p

enactment and later evolut
strate a clear intent on the
future traders. The princi
tures Act of 1922, forerun
manipulative practices whi
market. In 1922, the Senat
and Forestry stated that

> "[t]ransactions in gra
> public for speculation .
>
> "it is . . . clear that fluc
> are detrimental to farm
> S.Rep.No. 871, 67th Co

In 1936 when Congress
change Act, it was appare
tected under federal comm
include speculators." H.R.
2d Sess. 84 (1978). In 1
amended the 1922 Act in
and honest dealing on the
H.R.Rep.No. 421, 74th Con
protect hedgers and others
No. 1431, 74th Cong., 1st Se

> interstate commerce,
> subject to the rules o
> corner or attempt to c
> knowingly to deliver
> transmission through
> merce by telegraph,
> means of communica
> knowingly inaccurate
> market information or
> to affect the price of
> commerce, or knowing
> section 6, 6b, 6c(b) th
> of this title, . . ."

Section 4b prohib
nection with futures
1936 Amendments.[8] A
the purpose of this leg

> "honesty in the co
> [which] affect vi
> whether they be p
> that class of citiz
> haps aptitude, fo
> modities. . . ." H.
> Sess. 3 (1935).

When Congress a
ment the regulatory as
a major concern was t
to future traders unde
of speculators into th
situations mandant[i
futures trading regul
Cong. 2d Sess. 39 (197
speculator performs a
the futures market."
1974); See S.Rep. No. 9

Commenting on t
viously unregulated fu
stated that "there is n
one of the currently ur
not receive the same p
in the currently regul
975, 93 Cong. 2d Sess. 7

The Court below
almost "self-evident"

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8. The Commodi
No. 74-675, Section 5, 4

trading was for the
(JA 136) Indeed, n
Second Circuit that
satisfied. Some of
court,[9] found that
under the Act as a
traders in the futu
persons Congress s
Fischer v Rosentha
Mullis v Merrill Ly
492 F.Supp. 1345, (

While Sections
create private right
proscribe certain c
factor recommende
non, this Court exp
ing language of the
accurate indicator
a cause of action."
history of the CE
"duties" created in

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9. The district
Robert Dole that a
1974 amendments w

> "[to protect] a
> to protect any
> in futures mar
> (Sept. 9, 1974)

10. The Secon
9(b) is a penal pro
find implied remedi
J. I. Case Co. v Bo
Ash, Justice Brenn
possibility of findi
statutes. ("Clearly
not necessarily *pre*

to benefit a sp
ities exchange

Thus, appl
—the languag
favors the con

**The Legislativ
gressional**

Congress
of private acti
numerous refe
ing "overwhel
with implied p

Notable a
made by Repr
House Commit
marks that "c
individual liti
110 Cong. Rec.

During th
amend the CE
a commodities

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of action for d
Brennan found
of a shareholc
forbid corpora
cal contributio
sions of this C
basis for infer
sort lay in fav
should be alig
was clearly e
traders.

tified that private damage actions were available under the Act. *Hearings on S.2485, S.2578, S.2837 and H.R. 13113 before the Senate Committee on Agriculture and Forestry,* 93rd Cong. 2d Sess. 205, 737, 746 (1974). See also *Hearing on H.R. 11955 before the House Committee on Agriculture,* 93rd Cong. 2d Sess. at 139 and 249 (1974).

The Court below found that the 1974 Amendments provided the proper circumstances in which to apply "the well-recognized cannon of construction that the re-enactment of a statute incorporates preceding judicial interpretations," *Van Vranken v Helvering,* 115 F.2d 709, 719, (2d Cir., 1940), *cert. denied,* 313 U.S. 585 (1941), quoted at JA 144; See also *Shapiro v United States,* 335 U.S. 1 (1948); *Commissioner of Internal Revenue v Bilder,* 289 F.2d 291 (3d Cir. 1961); *Francis v Southern Pacific Co.,* 333 U.S. 445 (1948). As noted by the Court, this canon has not been limited to situations where prior judicial interpretations have been supplied by a court of the highest order. See *Lorillard v Pons,* 434 U.S. 575 (1928); *Electric Storage Battery Co. v Shimadzu,* 307 U.S. 5, 14 (1930). See also *CIR v Noel's Estate,* 380 U.S. 678, 682 (1965) [a "long-standing administrative interpretation applying to a substantially re-enacted statute, is deemed to have received Congress' approval"]; *Cannon v. University of Chicago,* 441 U.S. at 697 [law which elected representatives were "assumed to know" was construction of Title VI by lower federal courts].

Petitioner Clayton asserts, however, that the re-enactment doctrine cannot be applied in this case since . . . "Congress did not put its imprimatur on the language of Sections . . . 4b and 9(b) by re-enacting that language," . . . and since Congress "amended the CEA"

rather than enacting "an entirely new statute". (Brief of Petitioner Clayton Brokerage Co. of St. Louis, Inc. pp. 42-43) Petitioner's arguments are misguided, however. The appearance of a provision in a re-enacted statute in a form which is substantially similar to its original form is the very reason for invoking the canon. See *United Shoe Workers of America AFL-CIO v Bedell,* 506 F.2d 174 (D.D.C. 1974) [words or phrases taken from prior legislation are to be given same meaning].

Petitioner's second argument that the CEA was amended rather than re-enacted in 1974 is similarly without merit. Apart from the fact that the 1974 amendments constituted "the first complete overhaul of the Commodity Exchange Act since its inception," H.R. Rep. No. 93-975 at 1, Petitioner offers no convincing reasons weighing against the application of this canon. Moreover, the re-enactment doctrine *has* been applied to an amended version of a statute where the legislature does not substantially change a section in an amendatory act, and therefore impliedly approves a pre-existing construction of that section.[11] *Grand River Dam Authority v National Gypsum Co.,* 352 F.2d 130, 136 (10th Cir. 1965).

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11. Petitioners Heinold Commodities, Inc. and Thomson & McKinnon, Auchincloss Kohlmeyer, Inc. ("Heinold and TMAK") have also attempted to discredit the use of the re-enactment doctrine. Heinold and TMAK cite the *Lorillard* decision as authority for the proposition that application of this doctrine is exclusively limited to situations where a statute is re-enacted without change. (See Brief of Heinold & TMAK at p. 36) In *Lorillard,* this Court stated:

> ". . . where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law . . ." 434 U.S. at 581.

Assuming, *arguendo*, that the re-enactment doctrin were not applicable, this Court has stated that Congres sional action must be evaluated in light of its "contem porary legal context" *Cannon v University of Chicago* 441 U.S. at 698-699. Thus, the relevant inquiry is no "whether Congress correctly perceived the then state o the law, but rather what its perception of the law was." *Brown v G.S.A.*, 425 U.S. 820, 828-29 (1976), quoted i *Cannon v University of Chicago*, 441 U.S. at 710-11. I 1974, Congress perceived, and correctly so, that implie private causes of action were permitted under the CEA Moreover, the judicial climate during the period of 1960' and the early 1970's was so receptive to the implicatio of private remedies that this Court described it as on in which it "had consistently found implied remedies." *Cannon v University of Chicago*, 441 U.S. at 698. Eve prior to the decision in *Goodman v Hentz*, a long paralle line of cases held that private damage actions could b maintained under various provisions of the Securitie Laws. *Karden v National Gypsum Co.*, 69 F.Supp. 51 (E.D. Pa. 1946); *Fischman v Raytheon Mfg. Co.*, 18 F.2d 783, (2d Cir. 1951); *Baird v Franklin*, 141 F.2d 23 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944); *J. I. Cas Co. v Borak*, 377 U.S. 426 (1964).[12] Whether or not al

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Helvering v Hallock, 309 U.S. 106 (1940), relied o by Petitioners, is clearly distinguishable from th instant cases in that in *Helvering*, there was n "long uniform administrative construction" of th statutory provision at issue. 309 U.S. at 121, n. 7 (See Brief of Petitioners Heinold and TMAK a pp. 35-36).

12. The Court below found that the analogy be tween the Securities Exchange Act and the CEA wa particularly worthy of comment, since "the 1936 amend ments arose from an explicit concern to make protectio in the commodities field as strong as it was in the securi

of these cases were correctly decided in light o
Court's recent pronouncements in *Touché* and *Can*
not important here, for Congress in 1974 cannot
monished for failing to anticipate these decisions. *A*
Court below aptly observed "[t]he question here
whether all these decisions were wrong in light
preme Court opinions of the past four years, . .
whether the 1974 Congress was not justified in a
ing they would be followed with respect to the
(JA 116)

Given the circumstances surrounding the enac
of the 1974 Amendments, it was not unreasonable f
Court below to require a strong showing of legis
intent to abolish private causes of action unde
CEA. (JA 146) Yet the legislative history is dev
any reference which reveals Congress' lack of ap
of these rights or any intent to abrogate them. *Al*
Lerner, 485 F.Supp. at 878. Petitioners take the po
however, that the regulatory scheme provided by
gress when it enacted the CEA in 1936, the CFT
1974 and the Amendments of 1978[13] demonstrat
intent on the part of Congress that these remed
exclusive. Furthermore, the Petitioner states that
withstanding the decisions of several courts which
nized or gave effect to purported causes of action

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ties field." (JA 116, n.5) As the Court noted, p
remedies under the Securities' Exchange Act
consistently upheld even though the Act contai
"panapoly of other remedies." The Court aptly obs
that "[t]he silence of the 1974 Congress with resp
private causes of action for violations of the CEA
no more significant than the similar silence of th
Congress which extensively amended the Securiti
change Act, 89 Stat. 97." (JA 128)

13. Futures Trading Act of 1978, Pub.L. No. 9
92 Stat. 865

on the CEA, no such right of action has ever in
isted."[14] If Petitioner's assertion is correct,
courts located in virtually all of the major co
trading centers were granting relief under non-
remedies for nearly a decade prior to Congress
tion in 1974. Had this been the case, this practi
would have prompted Congress to express its dis
in some affirmative manner. Congressional silenc
does not square with Petitioner's theory.

Some courts which have held that the 1974
ments abolished pre-existing private remedies
pressed the view that Congress intended the new
tions procedure in Section 14 of the Act, 7 U.S
to be the exclusive private remedy under the ne

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14. Brief of Petitioner Clayton, p. 45

15. Section 14, 7 U.S.C. 18 provides in p
part:

(a) Petition

Any person complaining of any violatio
provision of this chapter or rule, regulation,
thereunder by any person who is register
section 6d, 63, 6j, or 6m of this title may
time within two years after the cause of a
crues, apply to the Commission by petitio
shall briefly state the facts, whereupon, i
opinion of the Commission, the facts the
tained warrant such action, a copy of the c
thus made shall be forwarded by the Comm
the respondent, who shall be called upon t
the complaint, or to answer it in writing,
reasonable time to be prescribed by the Co

(b) Investigation and hearing

If there appear to be, in the opinio
Commission, any reasonable grounds for in
ing any complaint made under this section,
mission shall investigate such complaint
if in its opinion the facts warrant such acti

The reparations provision allows per
aggrieved by violations of any rule, provi
lation of the Act to file an administrative c
the Commission. The Commission must th
whether reasonable grounds exist for initia
trative proceedings. A reparations order
appeal in the court of appeals and is enfo
district courts. However, Section 14 is o
to violations committed by those who are
required to register under the Act.[16] The
correctly reasoned that Congress could no
to substitute reparations procedures for pr
actions since the ultimate effect of such an i

---

said complaint served by registered ma
fied mail or otherwise on the respond
such person an opportunity for a he
before an Administrative Law Judge
the Commission in any place in which
son is engaged in business: Provided,
plaints wherein the amount claimed
does not exceed the sum of $5,000, a
not be held and proof in support of
and in support of the respondent's a
supplied in the form of depositions or
ments of fact.

(c) Determination

After opportunity for hearing o
where the damages claimed exceed the
has been provided or waived and o
where damages claimed do not exce
$5,000 not requiring hearing as provid
Commission shall determine whether
spondent has violated any provision o
or any rule, regulation, or order there

16. Sections 4d, 4k, 4e and 4m require
tion under Act of FCMs, certain associa
floor brokers, commodity trading advisors
ators.

would be to free from private liability
operators and exchanges who were forn
private damage suits. (JA 148, 149) The
tory of the CFTCA indicates that by esta
comprehensive regulatory scheme, Cor
"to extend further protection to the exc
rather than to extinguish existing forms
Curran v Merrill Lynch, Pierce, Fenne
F.2d 216, 232 (6th Cir. 1980). Chairman
fore the House of "new customer prote
under the Act. 120 Cong. Rec. 10737 (
Similarly instructive are the remarks
madge.

> "The vesting in the Commission of
> have administrative law judges and
> spectrum of civil and criminal pena
> not intended to interfere with the
> way." 120 Cong. Rec. 30459 (Sept. 9

---

17. The remarks later made by Sen
on the floor of the Senate during the deli
1978 Amendments are persuasive evide
that Congress intended the reparations
an alternative remedy to private suits. In
amended Section 14 to increase the doll
ration claims that could be handled by
without resort to a hearing. Senator H
that the Commission was plagued with
backlog" of reparation cases, a situation
pounded by the "unfortunate position"
Federal district courts that the reparati
intended to provide an exclusive remedy
dleston explained that with the proposed

> ". . . an agrieved commodity custo
> to obtain more expeditious treatme
> *should the customer elect to pursue*
> *rations rather than proceed to arbit*
> *in court the private right of action*
> *judicially implied for violations if ce*
> *of the Commodity Exchange Act,*

In addition, to the reparations
Amendments added another form
7 U.S.C. 7a(11)[18] This section requ
to provide arbitration procedure
grievances against its members. Ho
procedure by the customer is expre
the Act. The informal nature of
dures coupled with the permissive l
ations provision (an individual "ma
remedies), favors the conclusion
were intended "as a supplement, t
stitute for the existing private rig
v Groover, 468 F.Supp. at 114.

The Second Circuit relied on t
ings clause, Section 2(a)(1), 7 U.
dence of Congressional intent to pr
dies. (JA 153, n. 36). When first
the exclusive jurisdiction section
part

> "Provided, that the Commissio
> jurisdiction of transactions de
> or relating to contracts of sal

---

future courts may recognize f
the act." (Emphasis added) 12
10537 (July 12, 1978)

18. Section 5a(11) requires c

> "Provide a fair and equita
> arbitration or otherwise (such
> registered futures association
> ing for such procedures) for
> tomers' claims and grievances
> or employee thereof: Provide
> such procedure by a custome
> (ii) the procedure shall not
> claim in excess of $15,000 . . ."

> future delivery . . . And prov
> ing herein contained shall
> jurisdiction at any time con
> Exchange Commission or o
> ties under the laws of the
> 13113, Section 201.

Although reaction by the Senat
by no means limited to concer
existence of private rights, the fe
would be barred access to the c
hearings before the Senate Comm
expressed concern that this pro
reparations provision, might h
hibiting all court actions under
testified: "Unfortunately, the H
not authorize (treble damage a
of that Bill may prohibit all cou
S. 2485, S. 2578, S. 2837 and H.R.
Committee on Agriculture and
Sess. p. 1 at 205. Similar warni
mony of Professor Roy A Schotl
Clearwaters, Assistant Attorne
obvious response to these wa
added a sentence to the House

> "Nothing in this section sha
> jurisdiction conferred on co
> or any State." H.R. 13113 a
> Committee, Section 2(a) (1
> 1131. 93rd Cong, 2d Sess. 5

This sentence, after what must
sideration by the Congress, is n
tion 2(a) (1), 7 U.S.C., Section
Conference Committee which ad
ment explained:

"... nothing in the Act
jurisdiction presently
United States or any st
34997 (Oct. 10, 1974).

In sum, nothing in the
suggests that Congress in 1
rights of action. To the cont
rectly concluded that there
Congress' affirmative intent
tinue to exist.

I

**The Continuation of Implie
Effectuate the Statutor
Exchange Act.**

The third question u
whether or not the implica
"consistent with the under
lative scheme." 422 U.S. at 7

In *Canon*, this Court ex
right of action "is necessa
accomplishment of the stat
decidedly receptive to its im
Cannon v University of Chic
purpose of the CEA is "to in
dealing on the commodity e
vesting public. Implied priv
only "helpful" but "necessa
of the Act. When Congres
its goal was to improve the
of the Act, which was inade
ket practices. See H.R. Rep
Sess. 48 (1974). A continu

totally consistent with t
the Commission itself h
remedies are *necessary*
resouces which are insu
commodity-related trans
Curiae, p. 34 cited in O
also *Berenson v Madda*
Rep. ¶20,689 (D.D.C. 19
5).

Congress' awarenes
existence of private lit
Huddleston's remark th
cases placed an "undue
gram." 124 Cong. Rec. Se

The CFTC and the S
are both federal agencie
tion and enforcement
schemes. Both agencies
loads which tend to imp
form their enforcement
Borak, this Court held
provide a "necessary su
. . ." since "the possibilit
most effective weapon in
377 U.S. at 432.[19] The

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19. In *Borak* this
could be brought under
change Act of 1934, the
tion of proxies. This C
that the Securities Exc
ine a large volume of
was thus unable to ad
sentations set out in t
Second Circuit observed
resources to effectively
transactions. (JA 170)

Circuit, observing
Commission "does
enforce" its statute

"[a]bsent judi
action, the fed
fail to provide t
rities industry
son v Flescher
cert. den., 436

The CFTC is a
Exchange Commis
cannot possibly dis
tions effectively and
tion complaints. It
under the CEA, pri
essary supplement

**A Private Cause o
change Act Is
Law.**

The answer to
analysis, "is the ca
gated to state law,
infer a cause of a
422 U.S. at 78, does
The claims here are
law." Courts have
provision of Sectio
the applicability of
modity futures tra
Ltd. v Bell, 262 Ar
denied, 436 U.S. 95

Wholesalers, Inc.
(Minn., January
Inc., 555 S.W. 2d
the district court
favors implicatio
is not a case whe
basically of conce
of Chicago, 441 U.

In *Touche R*
that the four fact
edies under the *C*
weight. 422 U.S.
where all four f
cause of action, "
. . . factors; all of
v University of C

For th
Super Spuc
to affirm th
Second Cir

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No. 80-936
(Consolidated with Nos. 80-757 and 80-895)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO,
Respondents.

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,
Petitioners,

v.

NATIONAL SUPER SPUDS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONERS HEINOLD COMMODITIES, INC. AND THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.

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Counsel for Petitioner Thomson & McKinnon Auchincloss Kohlmeyer Inc.

QUESTION PRESENTED FOR REVIEW

Did Congress create an implied cause of action for da
ages against commodity brokers under the following p
visions of the Commodity Exchange Act:

(i) Section 4a which authorizes the Commodity I
tures Trading Commission, formerly the Commod
Exchange Commission, to set speculative trading a
position limits for specific commodity futures contra
and which makes it unlawful to exceed those limits;

(ii) Section 4b which makes it unlawful for a mem
of a commodity exchange to "cheat or defraud"
customers; and

(iii) Section 9(b) which makes it a felony for a
person to "manipulate . . . the price of any commod
in interstate commerce, or for future delivery on
subject to the rules of any contract market, or to cor
. . . any such commodity . . ."

despite expressly providing many judicial and administ
tive means of enforcing these provisions including crimi
penalties, civil fines and an administrative remedy for
spondents' claims.

PARTIES BELOW

The parties to the three consolidated appeals below

No. 79-7402

Appellants: Neil Leist, Philip Smith and Incomco,

Appellees: Heinold Commodities, Inc. ("Heinold"), son & McKinnon Auchincloss Kohlmeyer Inc. ("Thon Clayton Brokerage Co. of St. Louis, New York Me Exchange ("Exchange"), Richard B. Levine, Howard and Alfred Pennisi.

No. 79-7464

Appellant: Incomco,
Appellee: Exchange.

No. 79-7482

Appellants: National Super Spuds, Inc., William R. Jr., Willard C. Shiner, Eugene P. Weisman, Richard Raymond Rothberg, Arthur S. Armstrong, Theodore Capgain Holdings, Inc. and Heiz Romminger,

Appellees: Heinold and Thomson.

Heinold and Thomson seek review of the judgment 79-7402 and No. 79-7482. Heinold and Thomson w parties to the appeal in No. 79-7464.

Heinold and Thomson are corporations. A listing parent companies, subsidiaries and affiliates appears Joint Petition for a Writ of Certiorari to the United Court of Appeals for the Second Circuit filed in No. 8

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*The following abbreviations are sometimes used in thi "CEA" for the Commodity Exchange Act, as amended (7 § 1 *et seq.*); "CFTC" for Commodity Futures Trading Com "FCM" for futures commission merchant; "Joint Petiti Heinold and Thomson's Joint Petition for a Writ of Certiora United States Court of Appeals for the Second Circuit; Brief" for Brief of Petitioners Heinold and Thomso decision of the court below, *Leist* v. *Simplot*, 638 F.2d 283 1980), is referred to as *Leist*. The page numbers to the majo dissenting opinions used in this brief are the page numbers a in the Joint Appendix (J.A.). *Rivers* v. *Rosenthal & Co.*, 7 774 (5th Cir. 1980), is referred to as *Rivers*. The page nu the *Rivers* opinion used in this brief are the page numbers a in the Joint Appendix to Supplemental Briefs in Support of for Writs of Certiorari to the United States Court of Appeal Second Circuit filed by all petitioners in these consolidat (J.A.S.).

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tional Sea Clammers Association
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(Consolidated wi

SUPREME COURT
Octo

HEINOLD COMMODITI
MCKINNON AUCHINCL

NEIL LEIST, PHILIP SM

HEINOLD COMMODITI
MCKINNON AUCHINCL

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On Writ of Certiorar
Appeals f

REPLY BRIEF O
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OPI

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sent (J.A. 83-249) are
1980). The opinion of th
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at 470 F.Supp. 1256 (S.

The judgment of th
July 8, 1980. The C
timely petitions for re
en banc on September
tioners' timely Joint
jurisdiction of this
§ 1254(1).

CONSTITUT
PROV

Sections 4a, 4b and
Act, as amended (7 U.
I, section 1 of the Un
in these petitioners'
clause 2 and article
Constitution are set fo

STATE

The Statement of
Thomson is set forth i

PRELIM

A review of the br
CFTC as *amicus curi*
why implied damage
respondents from Sect
than to repeat or p
majority opinion belo
that opinion have, how

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[1]In footnote 2 of its
have no cause of action

denying implied
shortly before ar
8, 1981: *Middles*
Sea Clammers
Industries, Inc.
(1981); *Rodrigu*
1945 (1981); *Cal*
Northwest Airli
S.Ct. 1571 (1981
Coutu, 101 S.Ct.

I. THE MAJO
IGNORE TH
THAT DAM
CONGRESS
FROM LAN

As pointed out
power, possessed
through the pass
approval by the

(footnote continue
It correctly notes
petitioners] cannot
circumstances wher
[Citation] In this
'permitted' their
Section 4a does no
further states that
mitting the alleged
party. [Citations]
futures commissio
allegedly defrauded
a violation of Sec
charges under 4a a

"laws." (In
comment has
damage reme
of a statute,
Powell's diss
U.S. 677, 746

The respo
stitutional is
well as the m
to evade th
ment, or on e
plication of r
outdated prec
the decision l
determination
one. *Burnet* v
(1932) (Bran
stitutional pr
past decision
tigious autho
the Constituti
Tompkins, 304

Since Justi
730-749 (1979
statutory dam
nize such impl
Ross & Co. v.
Mortgage Adv
ger v. *Report*
U.S. 136 (198

Radcliff; Rodriguez; and *Sea Clammers.*[2] While these decisions have not specifically been based on an invocation of the constitutional issue, they repeat over and over again that federal courts today have no general common law quasi-legislative powers, and cannot by their decisions create damage remedies which Congress has not created by affirmative legislative action clearly taken with the intent to create such remedies. "The federal judiciary will not engraft a remedy in a statute, no matter how salutary, that Congress did not intend to provide." *Sierra Club,* 101 S.Ct. at 1781.

A right to a damage remedy is distinct from any other rights granted under a statute. The question whether a federal court has jurisdiction over a controversy is distinct from whether plaintiff has a cause of action, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 249 (1951), and the question whether the statute creates a cause of action is distinct from the question of what relief is authorized: "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis* v. *Passman,* 442 U.S. 228, 239 (1979).

A. Federal Courts Cannot Supply A Damage Remedy As A Complement To a Statutory Right.

The majority opinion mistakenly assumes that cases adopting the common law tort theory enunciated in *Texas*

---

[2]The question whether a damage remedy can be implied when a constitutional right is violated does not depend on statutory interpretation, as does the implication of statutory rights, and involves entirely different considerations: *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1973); *Davis* v. *Passman,* 442 U.S. 228 (1979); *Carlson* v. *Green,* 446 U.S. 14 (1980).

& Pacific Railway Co. v. *Rigsby*, 241 U.S. 33 (1916) are still sound law. Not only is the *Rigsby* case's exposition of the tort theory quoted at length (J.A. 117-18), the majority opinion cites a long line of cases based on it as if they were valid precedents for the implication of damage remedies, (J.A. 116-19). The majority opinion argues throughout as if it were unaware that in *Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963), the tort theory was specifically repudiated.[3] *Cf., Redington*, 442 U.S. at 568.

As the Court in *Rigsby* recognized, its implication of a damage remedy was "but an application of the maxim, *Ubi jus ibi remedium.*" (241 U.S. at 39-40). But *ubi jus* is a maxim of the common law courts, based on the broad quasi-legislative powers of the original common law courts inherent in the declaratory theory of judgments. The reasoning of *Erie* proves that this maxim, which, in effect, confers lawmaking power on common law courts, can no longer apply to our federal courts except in the narrow field in which a federal common law exists. Hence, this Court has refused to hold that a cause of action can be created by "judicial power to fashion appropriate remedies for unlawful conduct." *Northwest Airlines*, 101 S.Ct. at 1582:

> ". . . it remains true that federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers. [Citation]
>
> • • •
>
> "In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete

[3]Despite its importance in the development of the law of implied remedies, the majority opinion nowhere cites *Wheeldin* except as noting its citation in *Cort* v. *Ash*, 422 U.S. 66 (1975). (J.A. 126 n. 20). The dissent properly chides the majority opinion for "ignoring" this decision. (J.A. 217).

provisions. But the authority to construe a statut fundamentally different from the authority to fash a new rule or to provide a new remedy which Congr has decided not to adopt." *Id.* at 1582-83.

(Language repeated verbatim in *Radcliff*, 101 S.Ct. at 20 Because "we are not in the free wheeling days ante ing *Erie*," *Wheeldin*, 373 U.S. at 651, it is time for end to any confusion concerning what can "imply" a ri of action for damages. No longer may federal courts fol *Rigsby* and imply a damage remedy not intentionally cre by provisions enacted by Congress.[4] If such a right is exist it must be expressed or implied in what Congress ena

B. The Present Case Is Not Within Any Of The ceptions To The Federal Courts' Lack Of Autho To Create Remedies.

There are certain exceptions to the lack of authority federal courts to fashion new remedies. One is the po of federal courts sitting as courts of equity, to use tr tional equitable remedies to carry out clear and unequiv Congressional commands. *Virginian Railway Co.* v. *Sys Federation, No. 40*, 300 U.S. 515, 550 (1937). *Cf., Un States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960). *Transamerica*, this Court held that the language of Act before it, which specifically pronounced certain tracts "void," necessarily meant that "the customary l incidents of voidness would follow, including the availabi of a suit for rescission or for an injunction against

[4]The pre-1974 cases under the CEA relied on by the maj and by the respondents were all based ultimately on *Rigsby*. (Joint Petition 20-25; Initial Brief 37-39). Not a single case up a damage remedy under Section 4a; and not a single case uphe damage claim against a broker brought by a non-customer u Section 4b.

tinued operation of the contract, and for restit
Transamerica, 444 U.S. at 19. The limited nature
power to supply an equitable remedy was emphasi
the immediately following caveat: "We view quite
ently, however, the respondent's claims for damag
other monetary relief . . . . If monetary liability to a
plaintiff is to be found, it must be read into the Ac
When a statute contains a specific command or cr
clear right, the legal incidents of that command o
may be enforced in equity. This is not the "implic
of a new remedy. In contrast, a right to receive p
in damages for breach of the command is an addition
remedy which may only be provided by Congress.

This distinction between damages and equitable reli
ignored by the majority opinion.[5] Hence, it relies on ca
volving merely the granting of equitable relief,
States v. *Republic Steel Corp.*, 362 U.S. 482 (1960) (c
J.A. 118); *United Egg Producers* v. *Bauer Int'l. Cor*
F.Supp. 319 (S.D.N.Y. 1970) (cited at J.A. 120, 12
Kelley v. *Carr*, 442 F.Supp. 346 (W.D. Mich. 1977)
at J.A. 165), which are not authority for the judicial c
of *damage* remedies.[6]

---

[5]The majority opinion's misunderstanding of the issue is
in its assertion (J.A. 124 n.17) that "if implied causes o
did not exist under the Act, there would be no cause of ac
an injunction any more than there would be for damages.
Court's decision in *Transamerica* exposes the error of the m
assertion.

[6]Another exception is the statutory grant of general a
jurisdiction to the federal courts which has been held to a
the formation "of judge-made rules of maritime law." *N*
Airlines, 101 S.Ct. at 1583. A third exception is the grant of
ity to issue a declaratory judgment "whether or not further re
could be sought." (28 U.S.C. § 2201). Hence, the majority o

(footnote continued on ne

II. DAMAGE REMEDIES MAY ONLY BE FROM LANGUAGE ACTUALLY ENACT LESS THAT LANGUAGE IS SO AMBIG TO PERMIT RESORT TO LEGISLATIVE I

"Implied damage remedies" must be implici thing. Since only Congress can create a dama and can do so only by enacting a statute, it fo implied rights must be implicit in the language of enactments of Congress which the plaintiffs iden source of their rights.[7] This is why "the quest existence of a statutory cause of action is, of c of statutory construction." *Redington*, 442 U.S. a

In each case dealing with an implied statutory question is the nature of the legislative intent a specific statute. . . ." *Davis* v. *Passman*, 442 U

(footnote continued from previous page)

reliance on *Allen v. State Board of Elections*, 393 U.S. (cited at J.A. 118, 146) is misplaced. Contrary to (J.A. 118), this decision did not "sanction an impli action under § 5 of the Voting Rights Act." It mere "appellants may seek a declaratory judgment that a new ment is governed by § 5." 393 U.S. at 555.

[7]Since "our task is limited solely to determining w gress intended to create the private right of action as when it enacted the Act, *Redington*, 442 U.S. at 568, "a begin with the language of the statute itself." Hence, Court pointed out in *Amtrak*, 414 U.S. 453, 456 (197 for the bringing of [the implied] action must be foun within the four corners of [the] Act." The criteria set f v. *Ash* were to be used "[i]n determining whether a pri is *implicit in a statute* not expressly providing one" (42 emphasis added); that is, implicit in the statutory langu by Congress.

The language of the statute controls, with o
if that language is in itself so ambiguous
resort to extraneous aids to interpretation, su
tive history. But "there is no need to refer
tive history where the statutory language is cl
canon of construction has received consistent
our decisions." *Ex Parte Collett*, 337 U.S.
(footnote omitted). Here the statutory langua
ing of the relevant sections of the CEA and of
whole—is clear. It is totally silent as to any in
action.[8] Not a word in the relevant sections rai
to the intent of Congress not to provide a da
or makes the Act ambiguous. What the ma
has attempted to do by use of the 1974 legis

> "is not a construction of a statute, but,
> enlargement of it by the court, so that wha
> presumably by inadvertence, may be in
> its scope. To supply omissions transcend
> function." *Iselin* v. *United States*, 270
> (1926).

In contrast, the Court in *Cannon* emphasized th
of "right-creating" language which led to the

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[8]While *Cort* v. *Ash* suggests use of legislative hist
of the three factors which this Court has recognized
relied upon in determining legislative intent." *Redi*
at 576. Hence, *Cort* presumably suggested no
traditional use of legislative history—to clari
Consulting legislative history in the absence of an
statute itself is fraught with particular dangers in tha
encourages single members of Congress, or even con
to "legislate" merely by making a suitable legislative
avoiding the political process of lawmaking envision
stitution. Furthermore, courts are thereby given
to enlarge upon unambiguous enactments by selecti
snippets of often conflicting legislative history.

of the legislative history. In this case, Section 4a, 4b or 9(b) contains any "ri guage.

Moreover, legislative history cannot ir ambiguities which justify resort to such h of legislative history, "[l]ike other extr struction," is " 'to *solve*, but not to *creat* *United States* v. *Shreveport Grain & Ele* 77, 83 (1932) (emphasis in original).

These precedents show that the intentio edy must be found implicit somewhere in t which Congress used in its enactment. clarified in *Coutu:*

> "But the fact that an enactment is a particular class does not end the it must also be asked whether the *statute* indicates that Congress int enforced through private litigation. 444 U.S. at 17-18." *Coutu,* 101 S.Ct. added).

III. THE APPROACHES ADOPTED B ITY OPINION BELOW AND BY ENTS IGNORE THE CONSTI QUIREMENT THAT A DAMAG ENACTED BY CONGRESS.

Neither the majority nor any of the res contend that the 1936 Congress, in ena 4b or 9(b) of the CEA, enacted or intend to sue for damages under those sections. T that Congress took no affirmative action a private cause of action for damages fo tions 4a, 4b or 9(b). Hence, the majorit use several intellectual constructs in an

a source for a damage remedy. None o
fact that such a remedy has never been

**A. The Majority Opinion's Argume
age Remedies Were "Established
Decisions Before 1974, (2) That
Established Were Not Repealed
1974, And (3) Hence "Continue"
False Assumptions And Begs
Whether Congress Ever Created**

The majority opinion asserts that by
1974 amendments "the courts had rea
action into the statute" (J.A. 128) an
thus [is not] whether Congress inten
private right of action in 1974, but r
tended *sub silentio* to alter the signifi
been given these provisions by making
Act." (J.A. 127). This formulation o
tutionally self-defeating since it is based
tion that the pre-1974 lower court dec
the claimed damage remedy. Court de
damage remedies not expressed or imp
acted by Congress.

The CFTC poses the same erroneo
slightly different manner, arguing tha
be found to have repealed a *statutor*
pressly states its intention to do so,
conflict exists between the earlier and
(Br. 14; emphasis added). Since, as t
concedes, a right to damages was not
in 1936, that alleged right to damages
right.

Again, these arguments rest on the f
the federal courts by their decisions

right of action into the statute.'
remains unanswered by respondei
language of the 1936 enactment
Congress to create damage reme

**B. Reliance On The Canon Of
Reenactments Of Statutory**

The majority opinion asserts
the 1974 amendments to the Act h
'the well-recognized canon of co
ment of a statute incorporates pr
tions . . . .' " (J.A. 144). The lo
cases where specific language wi
gloss is repeated in a new ena
language used in the earlier
considered to have adopted also
this Court to such language, a
actment.' " *Shapiro* v. *United S*
(footnote omitted). But the leg
Congress in 1974 does not conta
relevant portions of Sections 4a
single sentence of the substant
visions.[9] Moreover, as discusse
tition at 19-25 and in their Initi
1974 cases did not establish a "

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[9]This point is made clear when
by Congress is examined. Public L
(October 23, 1974). As the maj
106-09) the texts of what are now
enacted in the amendatory legislati
Exchange Act of 1936." The CFTC
the entire CEA as amended was re
Senate Committee reports but ignore
by standing House and Senate Rule
the relevant provisions.

tion that rights of action for
implied in Section 4a, 4b and

The majority opinion asserts
port for the result we have reac
To the contrary, the present
where Title IX, enacted in 197
VI of the Civil Rights Act
stitution of the word 'sex' in
'race, color or national origin'
use identical language to de
Cannon, 441 U.S. 677, at 694-
language had been held to bestc
and "[t]he drafters of Title
would be interpreted and appli
Id. at 696. In 1974, however,
language in the CEA previous
explicit reference in the legisla
tive judicial decisions.[11]

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[10]Furthermore, as pointed out i
been reluctant to assume that lower
adopted by Congress in reenacting
379 U.S. 48 (1964); *United State*
City of New York v. *Saper*, 336 U
Glass Co., 332 U.S. 524 (1947); *W*
315 U.S. 32, 40 (1942).

[11]The 1974 Congress must be
assumptions underlying the pre-
remedy (discussed in detail in our
destroyed in *Wheeldin* and *Amtra*
all based directly or derivatively
decided and would not be followed
1974 amendments, this Court had
414 U.S. 453 (Jan. 9, 1974). The
Poage bill were held on January 23

IV. NEITHER THE M
ENTS HAVE POI
GUAGE FROM V
COULD BE IMPL

A. No Language Ena
Remedy.

Neither the majority
damage remedies may
contained in Sections 4
nor from any language
enactments. The CFTC
ing' language . . . is no
n.26). Similarly the bri
Spuds, Inc. admits, as it
the CEA "do not by the
favor of any special class.

(footnote continued from pre
were held on May 13-22,
October 10, 1974, some
Justice Douglas in a vigoro
the case was "on all fours"
426 (1964), (414 U.S. at
implied remedy was hence
in enacting the 1974 amend
of the fact that the reasonin
which later cases have con
avoid this awkward fact by
decided when the amendme
and that "there is no eviden
ments were aware of it." (J.
the majority opinion's refe
knows the law. (J.A. 127))
this important development
than realistic.

B. No Language E
Remedy.

The majority disav
"the question . . . woul
create a new private rig
it intended *sub silentio*
been given these provi
the 1974 Congress co
damage remedies is t
something affirmatively
did nothing of the kind.
judicial and administr
bill which would have
Initial Brief at 24-31.
intent to approve such

The majority and r
clause" found in nev
evidence that the 197

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[19]The CFTC argues th
to further the congressio
industry since state cou
related claims, would be
If this argument had a s
no more than a plea to jud
congressional purposes.
appears in light of the C
courts would not be prec
common law or state . .
plicability." (Br.19 n.19
Congress intended to "pr
uniformity by enacting a
the jurisdiction of the st
that federal courts in div
state court interpretatio
Breisch v. *Central R.R.*,

recognition" of
"savings clause"

> "Nothing in
> jurisdiction
> of any state.

This contention i
discussed in the
Clammers, 101 S
ment that a sa
2(a)(1) was inte
sue for damages.

V. EVEN IF
RELEVAN
VINCING
INTENDE
SIONS TO

In support of
[the 1974] Cong
rights of action .
ents rely almost
through the Hou
which deplore t
changes.[13] (J.A.
vate actions agai
that Congress wi
under Sections 4s

---

[13]The majority
Congress in 1974 t
the CEA in respo
142). This is puz
give any weight to
of private actions

In addition
exchanges, th
casual referen
ence in the H
have access to
several additi
litigation as a
can be said fo
they informed
tract markets
in the legislati
not brought u
some other st
evidence that
to an "estab
Congress ente
the suits were
event these fe
thousands of
insufficient to
considered, an
under Section
respondents.
J.A.S. 22a-23a

"The leg
which run

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[14]The only pr
the decision of t
Deaktor v. *L. I*
sub nom. Chica
(1973). *See,* J.
to recognize tha
not cited to the
damage remedy,
Mansfield's diss

> testimony and debates, fails to contain one word approving a private right of action, despite reference by a couple of witnesses and a senator to the subject." (J.A. 174-75).

The diametrically opposed conclusions of the majority and dissent below and the Fifth Circuit in *Rivers* (J.A.S. 21a-23a) drawn from the same legislative history demonstrates that the legislative history of the 1974 amendments, even if relevant, fails to provide *clear* evidence of congressional intent to approve "implied" damage remedies. Pertinent here is what this Court said forty years ago:

> "That both sides invoke the same extrinsic aids, one to fortify and the other to nullify the conclusion we have reached in itself proves what dubious light they shed." *FCC* v. *Columbia Broadcasting System*, 311 U.S. 132, 136 (1940).[18]

But, as discussed in our Initial Brief at 21, the intent of Congress in 1974 is not relevant and cannot be made so by any play on words.

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[18]The inconclusive nature of the legislative history of the 1974 amendments is illustrated by examination of two of the CFTC's citations. The CFTC relies on the statements of William F. Brooks and Sheldon L. Berens before the House Committee on Agriculture because both statements make passing reference to court actions. Yet these statements are made in the context of bringing attention to the fact that the proposed administrative reparations procedure was inconsistent with such actions. See Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Comm. on Agriculture, 93d Cong., 2d Sess. 52, 321 (1974). While the CFTC would infer approval of damage actions from these snippets, this inference is clearly no more or less compelling than its opposite.

CONCLUSION

For the reasons set forth in petitioners' briefs, the decision of the court below holding that an implied cause of action for damages against futures commission merchants under Sections 4a, 4b and 9(b) of the Commodity Exchange Act is erroneous and should be reversed.

Respectfully submitted,

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APPENDIX

United States Constitution, article I, section 7, clause

"Every Bill which shall have passed the House Representatives and the Senate, shall, before it beco a Law, be presented to the President of the Uni States; If he approve he shall sign it, but if not shall return it, with his Objections to that House which it shall have originated, who shall enter Objections at large on their Journal, and proceed reconsider it. If after such Reconsideration two thi of that House shall agree to pass the Bill, it shall sent, together with the Objections, to the other Hou by which it shall likewise be reconsidered, and approved by two thirds of that House, it shall beco a Law. But in all such Cases the Votes of both Hou shall be determined by yeas and Nays, and the Nam of the Persons voting for and against the Bill sh be entered on the Journal of each House respective If any Bill shall not be returned by the President wit ten Days (Sundays excepted) after it shall have be presented to him, the Same shall be a Law, in li Manner as if he had signed it, unless the Congre by their Adjournment prevent its Return, in whi Case it shall not be a Law."

United States Constitution, article III, section 1:

The judicial Power of the United States, shall vested in one supreme Court, and in such inferi Courts as the Congress may from time to time ord and establish. The Judges, both of the supreme a inferior Courts, shall hold their Offices during go Behaviour, and shall, at stated Times, receive their Services, a Compensation, which shall not diminished during their Continuance in Office.